B.C.D. 09-2.3

EMPLOYER STATUS DETERMINATION
Tri-County Commuter Rail Organization
South Florida Regional Transportation Authority
Trinity Railway Express—Train Dispatching
Herzog Transit Services, Incorporated

JAN 20 2009

[redacted]

This is the determination of the Railroad Retirement Board pursuant to 20 CFR 259.1 concerning the status of South Florida Regional Transportation Authority (SF RTA), Herzog Transit Services, Incorporated (Herzog Transit), and Trinity Railway Express (Trinity) as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA).

Herzog Transit has previously been determined not to be a covered employer. See: B.C.D. 94-109 *Herzog Transit Services, Inc.* SF RTA and Trinity have also previously been determined not to be covered employers under the names Tri-County Commuter Rail Organization and Dallas Area Rapid Transit (DART) . See Coverage Notices No. 89-35, dated April 19, 1989; and No. 91-66, dated August 19, 1991, respectively. After a review of the evidence, in section II of this decision a majority of the Railroad Retirement Board, Labor Member Speakman dissenting, determines that SF RTA is not a covered employer under the Acts. A majority of the Board, Management Member Kever dissenting, also determines, as explained in sections II and III below, that Herzog Transit is a covered employer only with respect to train dispatching over the rail line of Trinity Railway Express in Texas. The majority of the Board further determines in section III below that Trinity itself is not a covered employer to the extent the train dispatching operation conducted on Trinity's behalf is reported by Herzog Transit. Management Member Kever dissents from the determination that Herzog Transit is a covered employer with respect to train dispatching for Trinity.

This is also the determination of the Railroad Retirement Board pursuant to 20 CFR 259.1 concerning the status of [redacted] as a covered employee of CSXT under the Acts. As explained in section IV of this decision, the majority of the Board, Labor Member Speakman dissenting, determines that [redacted] is not in the service of CSXT while operating a locomotive driving a Herzog Transit passenger train for SF RTA.

I. PRIOR BOARD PROCEEDINGS

In a summary decision dated April 19, 1989, the Deputy General Counsel of the Railroad Retirement Board determined pursuant to regulations of the Board then in effect (20 CFR 259.1(1991)) that the commuter passenger rail service operated by Tri-County Commuter Rail Organization through contract with UTDC Transit Services, Inc., was not an employer

covered by the RRA and RUIA. See: Notice No. 89-35, *Tri-County Commuter Rail Organization*.

In 1994, the Board learned that Tri-County had contracted with Herzog Transit Services, Inc. (Herzog Transit) to operate its commuter service. On December 5, 1994, the Board determined that Herzog Transit was not a covered employer under the Acts. Though a rail carrier, Herzog was not engaged in interstate commerce. See: Board Coverage Decision (B.C.D.) 94-109 *Herzog Transit Services, Inc.*

Beginning November 2003, the Board began receiving letters from Herzog Transit employees, directly and referred by Members of Congress. These letters requested the Board to reopen its prior decisions regarding Tri-County and Herzog Transit to find the service by these employees to be covered as well. The Board directed the Secretary to the Board to respond to these letters that the earlier decisions regarding Tri-County and Herzog Transit were final decisions, and further, that while under the regulations of the Board the Tri-County/Herzog employees may submit briefs or argument, they were not party to a determination of the status of a company as employer. See 20 CFR 259.2(a).

Mr. [redacted] also claimed in a letter received in December 2003 that his operation of a locomotive for Tri-County actually constituted service as an employee of CSXT Transportation. He stated his belief that his service was performed under the direction and control of CSXT because he was governed by CSXT rules, his locomotive was dispatched by CSXT dispatchers, interchanged cars with CSXT, and he held a Federal Railroad Administration license. Unlike a determination of the status of Tri-County as an employer, his claim for service as a CSXT employee rendered [redacted] a party to the Board's determination. See 20 CFR 259.2(b). Accordingly, on December 17, 2003, the Board therefore directed the Chief of the Audit and Compliance Section to review whether [redacted] service would be creditable under the Acts.

The Chief of Audit and Compliance obtained evidence from SF RTA, from Herzog Transit, and from the employees. After reviewing the evidence obtained, on February 2, 2006, the Board issued Board Order 06-12, appointing a Hearing Examiner pursuant to section 258.1 of the Board's regulations (20 CFR 258.1). The Board directed the Hearing Examiner to conduct a hearing and to obtain documents and testimony, and to prepare a recommendation to the Board as to:

> "whether there has been a change in the operations of Herzog Transit Services, Inc., which would affect its status as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts, as determined in Board Coverage Decision 94-109."

The Hearing Examiner held a hearing in Miami, Florida on May 16, 2006. The employees, the United Transportation Union (UTU), and Herzog Transit then submitted post-hearing briefs and additional documentary evidence. On August 18, 2006, the Hearing Examiner closed the administrative record.

The Hearing Examiner made his report to the Board on April 30, 2007, with copies furnished to Herzog Transit, UTU, and the employees. In his report, the Examiner recommended that the Board find that the changes in operations by Herzog Transit as a result of its commuter rail passenger operations for SF RTA in Miami; for Altamont Commuter Express in San Joaquin, California; for Waterfront Red Car in San Pedro, California; and for Rail Runner Express in Albuquerque, New Mexico did not render it a covered employer under the Acts. The Examiner further recommended that the Board find that Herzog Transit employees who dispatch freight service over the rail line of Trinity Railway Express (Trinity) in the Dallas-Fort Worth, Texas, are engaged in rail carrier service under a prior Board Decision. However, because Trinity had not been notified of or otherwise participated in the proceedings leading to the Hearing Examiner's report, the Examiner recommended the Board address the matter in a separate decision.

UTU, Herzog Transit, and the employees submitted exceptions to the Examiner's report on June 28, 2007. Herzog Transit also filed a response to the UTU exceptions on July 7, 2007. At the Board's direction, on December 7, 2007, the Hearing Examiner wrote to Trinity Railway Express to furnish a copy of his April 2007 report, and to allow Trinity to file any exceptions to the report as well. Trinity responded on January 17, 2008.

II. STATUS OF HERZOG TRANSIT AND SF RTA AS RAIL CARRIER EMPLOYERS

After reviewing the record and considering the Hearing Examiner's report and the exceptions thereto filed by the UTU, by Herzog Transit, by Trinity, and by Herzog employees, as well as the response to UTU exceptions filed by Herzog Transit, the majority of the Board, Labor Member Speakman dissenting, renders the following decision with respect to the status of Herzog Transit and SF RTA as rail carrier employers under the Acts:

1. Except as determined in Section III of this Decision below regarding the status of Herzog Transit as a lessee employer, the changes in the passenger service operations of Herzog Transit Services Inc. since the Board issued B.C.D. 94-109 do not render Herzog Transit a rail carrier employer covered by RRA section 1(a)(1)(i) and RUIA sections 1(a) and 1(b) because it is not subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code, and does not meet the conditions for coverage of commuter operations specified by 49 U.S.C. § 10501(c)(3).

2. The changes in the operations of Herzog Transit Services Inc. since the Board issued B.C.D. 94-109 do not render Herzog Transit an employer covered by RRA section 1(a)(1)(ii) and RUIA section 1(a) as a non-carrier affiliate which is under common control with a rail carrier employer because Herzog Transit Services Inc. does not provide services to its affiliated rail carrier company.

3. SF RTA is not a rail carrier lessor employer under the Acts because profit from railroad activities is not the primary purpose of SF RTA; because SF RTA does not operate or retain the capacity to operate its rail line; and because the operator/lessee of the rail line which provides freight rail service (CSXT) is already a covered employer under the RRA and RUIA.

In rendering this decision, the Board unanimously adopts and hereby incorporates the findings of fact Numbers 1 through 41 in the report of the Hearing Examiner, except that the Board modifies Finding Number 26, based on the January 17, 2008 submission by Trinity, to state that no Amtrak intercity trains run on Trinity rail lines. In addition, the majority of the Board, Labor Member Speakman dissenting, adopts and hereby incorporates conclusions of law 1 through 5, and analysis Parts I and II of the report of the Hearing Examiner, into this determination as if set forth in full herein. The Hearing Examiner's report is appended to this decision.

The Board in Board Order 06-12 did not direct the Hearing Examiner to consider the status of SF RTA under the Acts. However, the Board notes that the evidence of record is that SF RTA and the Florida Department of Transportation are both public entities not formed for profit, which have contracted the right to conduct interstate freight service over the SF RTA line to CSXT. Under the factors set forth in B.C.D. 00-47, *Railroad Ventures, Inc.*, (reconsideration decision), and which are discussed further by section III of this decision below, the majority of the Board, Labor Member dissenting, is satisfied that SF RTA is not a lessor of a rail line which is a covered rail carrier employer.

With respect to Herzog Transit, the UTU argues that the Board should not adopt either of the two recommended decisions of the Examiner. Regarding Herzog Transit's status as a rail carrier employer, UTU first argues it is anomalous that the Miami commuter operation would be conducted by a covered rail carrier under the RRA and RUIA if conducted by Herzog Transit subsidiary Transit America LLC, but not covered when conducted by Herzog Transit itself. UTU would have the Board consider all Herzog companies together as constituting one railroad system. However, UTU cited no authority to the Examiner, and now cites none to the Board, which would render one entirely intra-state passenger rail operator a rail carrier under Title 49 U.S. Code, Part A, subtitle IV, merely because it is under common ownership with an unconnected rail carrier in another State. UTU further argues that the language of section 10501(c)(3)(A) of Title 49 U.S.C. defines all local commuter passenger operators as rail carrier employers for purposes of the RRA and RUIA. The majority of the Board, Labor Member dissenting, agrees with the Hearing Examiner that this interpretation overlooks the subsequent language in section 10501(c)(3)(B), which limits STB authority over local commuter operations to those which would have met the standards for STB jurisdiction prior to 1996.

UTU also argues that Herzog Transit is a covered employer under the RRA and RUIA because it performs services in connection with railroad transportation. UTU attacks the Hearing Examiner's Conclusion of Law number 5, which states that a non-carrier company must perform more than a minimal proportion of services in connection with railroad transportation to the affiliated rail carrier to be held a covered employer under RRA section

1(a)(1)(ii) and RUIA section 1(a). UTU initially argues that this interpretation of the Acts, which follows the Board's decision in B.C.D. 93-79 *VMV Enterprises*, unnecessarily restricts both the amount of service performed, and the company which receives the services. In *VMV Enterprises,* the majority of the Board found that the Court of Appeals decision in Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404, (11th Cir., 1984) would require more than minimal service to find the non-carrier affiliated company to be a covered employer. The majority of the Board declines to disturb the rule stated by *VMV Enterprises,* and accordingly, the majority of the Board, Labor Member dissenting, finds that the Hearing Examiner correctly stated the rule to be applied to Herzog Transit.

UTU alternatively argues that even using the minimal services standard, Herzog Transit is a covered non-carrier affiliate employer because [redacted], an employee of Herzog corporate subsidiary Transit America, acts as head of Herzog Transit labor relations. However, Transit America is a covered rail carrier employer, while Herzog Transit is the non-carrier affiliate. Assuming *arguendo* that by reason of [redacted] work Transit America is performing a service in connection with railroad transportation, and further assuming that the service Transit America performs to Herzog Transit is more than minimal, the fact remains that the service is performed by the rail carrier to the non-carrier affiliate, rather than the reverse. Nothing in the RRA, RUIA, or the Board's regulations defines as a covered employer a non-carrier company which receives services from, rather than provides to, a rail carrier employer.

The majority of the Board, Labor Member Speakman dissenting, finds the exceptions by the UTU are without merit.

III. STATUS OF HERZOG TRANSIT DISPATCHERS FOR TRINITY RAILWAY EXPRESS

After reviewing the record and considering the Hearing Examiner's report and the exceptions thereto filed by the UTU, by Herzog Transit, by Trinity Railway Express, as well as the Herzog Transit response to the UTU exceptions, the majority of the Board, Management Member Kever dissenting, renders the following decision with respect to the status of Herzog Transit and Trinity Railway Express as rail carrier employers under the Acts:

3. Since the Board issued B.C.D. 94-109, Herzog Transit Services Inc. has contracted to operate the Trinity Railway Express in Dallas-Fort Worth, Texas. Trinity operates over a rail line which is jointly owned by the two constituent local transit agencies, Dallas Rapid Transit (DART) and the Fort Worth Rapid Transit agency ("the T"). In addition to operating commuter passenger trains, beginning January 2001 Herzog Transit has dispatched all train traffic over the Trinity line, including interstate freight trains. Trinity's retention of authority to direct train service over the rail lines owned by Trinity through DART and the T constitutes active rail carrier operation of the Trinity Railway Express rail line under the RRA and RUIA by Trinity as the owner/lessor. The assumption of this portion of active rail carrier operation by

Herzog Transit Services under contract with Trinity renders Herzog Transit a lessee rail carrier employer under the RRA and RUIA effective January 1, 2001, the date Herzog Transit assumed the new duty under its contract. However, the unit of Herzog Transit which dispatches trains over the Trinity line constitutes a discrete unit which is segregable from the commuter passenger business of Herzog Transit pursuant to section 202.3 of the Board's regulations.

In rendering this decision, the Board unanimously adopts the Hearing Examiner's findings of fact as if set forth in full herein, except that the Board finds sufficient evidence following the January 2008 submission by Trinity to render a decision as part of this proceeding. In addition, a majority of the Board adopts the Examiner's conclusions of law 6 and 7, and the Examiner's analysis Part III as if set forth in full herein. The Hearing Examiner's report is appended to this decision. Management Member Kever dissents from the majority decision to adopt the Examiner's conclusions of law 6 and 7.

Both Herzog Transit and Trinity have filed exceptions to the Hearing Examiner's report, arguing that as Herzog Transit is a bona fide business, independent from ownership or control by Trinity, which supplies to Trinity a service pursuant to a contract negotiated at arms-length, no employees of Herzog should be considered to be employees of a rail carrier. This analysis is based upon the decisions of the Tenth and Eight Circuit Courts of Appeals in Nicholas v. Denver & Rio Grande Western R.R. Co., 195 F. 2d 428, (10th Cir., 1952); and Kelm v. Chicago, St. P. M. & O Ry. Co., 206 F. 2d 831, (8th Cir., 1953). The Board has applied the rule in Kelm to determine in numerous cases that the service of employees of an independent contractor are not attributed to the contracting railroad for purposed of coverage under the RRA and RUIA. See, e.g., B.C.D. 01-25 *Adecco Employment Services*; and B.C.D. 03-01 *Training Consulting Connection*. However, the majority of the Board will not apply the Kelm decision to Trinity's contract with Herzog Transit because the question in this instance is not the service performed by the employees, but rather the activity conducted by their employer, Herzog Transit, on behalf of Trinity. That is, the issue is not whether individuals on the payroll of a contractor are statutory employees of a railroad under RRA sections 1(b)(1) and 1(d)(1) and RUIA sections 1(d) and 1(e), but rather whether the contractor itself is a rail carrier employer under RRA section 1(a)(1) and RUIA section 1(a).

As the Hearing Examiner noted, a line of Board decisions have defined the circumstances under which the owner which leases or contracts operation of its rail line to a rail carrier would remain a rail carrier employer under the Acts. B.C.D. 00-47, *Railroad Ventures, Inc.*, (reconsideration decision). Under *Railroad Ventures* the Board will determine that the rail line owner continues to be a rail carrier employer under the RRA and RUIA unless three conditions are met:

(1) the owner/lessor does not have as a primary purpose to profit from railroad activities;

(2) the owner/lessor does not operate or retain the capacity to operate the rail line; and

(3) the operator/lessee of the rail line is already a covered employer under the RRA and RUIA.

Applying the *Railroad Ventures* factors to the evidence, the majority of the Board agrees with the Hearing Examiner that Herzog Transit is operating as a rail carrier employer with respect to the track owned by Trinity. The two constituent transit authorities and Trinity own the rail line which Trinity uses for its local passenger service. Standing alone, this passenger service does not constitute rail carrier operation under the RRA and RUIA. However, Trinity's rail line is also used for interstate freight service. There is no doubt that if Trinity itself conducted this freight service over its line, Trinity would be a covered rail carrier under the Acts. California v. Anglim, 129 F. 2d 455 (9th Cir., 1942)(belt freight railroad operated by California held rail carrier subject to RRTA). Instead, freight service over Trinity's rail line is provided by four companies which are rail carrier employers under the RRA and RUIA: the Fort Worth & Western Railroad; the Dallas, Garland & Northeastern Railroad; the Union Pacific Railroad; and the Burlington Northern Santa Fe Railroad. Prior to 2001, when all aspects of this freight service were provided by covered rail carriers, Trinity thus met all three *Railroad Ventures* factors: its primary purpose was not profit from railroad activities; it did not operate or retain the capacity to operate freight rail service; and the freight rail service was conducted by covered railroad employers. Consequently, under *Railroad Ventures* Trinity is excluded from the coverage prior to 2001.

Beginning January 2001, the majority of the Board finds that Trinity took back from the freight railroads one aspect of rail operation: the power to dispatch trains running over its rail line. Train dispatching includes routing and tracking train progress, and coordinating the movement of one train with others. Dictionary of Occupational Titles with O*NET Definitions, (5th Ed. 2003), Occupation No. 184.167-262 Train Dispatcher, and O*NET Occupation No. 11-3071.01 Transportation Managers. Train dispatching is an essential element of safe train operation over a rail line. Canadian Pacific Limited, et al.—Purchase and Trackage Rights—Delaware & Hudson Railway Company, Surface Transportation Board Finance Docket No. 31700 (Sub. No. 13) December 4, 1998, (employer's transfer of train dispatchers voided due to adverse affect on rail safety). The majority of the Board recognizes that rail safety depends upon many other factors, such as proper track and signal maintenance, and even the purchase of proper equipment. These activities, however necessary though, impact on train operation indirectly and may be required to be performed while trains are not running (e.g., removal and replacement of track). In contrast, dispatching is as inextricable a part the actual motion of trains as is the operation of a train's locomotive controls by the engineer.

A rail line lessor which employs locomotive engineers to run freight trains in interstate commerce over its line would clearly be operating the rail line, regardless of other provisions of its agreement with a lessee. Compare, American Orient Express Ry. v. Surface Transportation Board, 484 F. 3d 554, (D.C. Cir., 2007)(company which owned neither locomotives nor track but contracted with rail carrier to operate company trains over designated interstate routes was held a rail carrier employer). Given the direct link

between operating trains and dispatching trains, the majority of the Board agrees with the Hearing Examiner's conclusion that if an owner of a rail line dispatches or routes trains in interstate freight rail service over its line, the company is actively conducting rail carrier business within the meaning of RRA section 1(a)(1)(i) and RUIA sections 1(a) and 1(b). Where the company or entity is principally engaged in non-carrier business, under regulations of the Board at 20 CFR 202.3(a), only the dispatching operation is the covered employer. B.C.D. 02-12, *Southern California Regional Rail Authority, Segregation of Dispatching Department* (train dispatching department of commuter rail authority held a covered employer).

In sum, Trinity's rail line is used in interstate freight rail service. If Trinity conducted all aspects of this freight service, it would be a covered employer; if Trinity conducted none of the freight service and merely held ownership of the rail line, Trinity would not be a covered employer. The facts are that rather than contracting all aspects of the freight service together, Trinity split the leased freight activity into two parts: operation of freight locomotives is leased to four rail carriers, while dispatching of those locomotives and their trains is contracted to Herzog Transit. As the Hearing Examiner correctly stated, under *Railroad Ventures* removing this aspect of rail carrier operation from the covered freight rail carriers cannot remove that portion of the operation from coverage. The record before the Board now includes a response from Trinity. Based on the record as supplemented by Trinity's January 17, 2008 response (subsequent to the Hearing Examiner's April 2007 report), the majority of the Board, Management Member Kever dissenting, finds Herzog Transit to be a rail carrier employer under the RRA and RUIA as lessee of the train dispatching operation over the Trinity rail line. Because Herzog Transit's principal business is operation of intrastate passenger rail service, however, only the dispatching unit under the contract with Trinity is the enterprise which is considered to be the employer under the regulations of the Board. 20 CFR 202.3(a).

IV. STATUS OF [redacted] AS EMPLOYEE OF CSXT

As noted in the summary of prior proceedings at section I of this decision, [redacted] also claimed in a letter received in December 2003 that his operation of a locomotive for Tri-County actually constituted service as an employee of CSXT Transportation. The Board has determined in section II above that SF RTA and Herzog Transit are not covered employers with respect to the Miami commuter passenger operation. The question remains whether [redacted] should be considered to be an employee of a covered rail carrier employer (CSXT) rather than of Herzog Transit, for purposes of crediting service and compensation under the RRA and RUIA. Board Order 06-12 did not request that the Hearing Examiner address [redacted] claim in his report. Based on a review of the evidence in record compiled by the Hearing Examiner, including [redacted] testimony at the hearing held May 16, 2006, the majority of the Board now determines that [redacted] service is not creditable under the Acts as service to CSXT. Labor Member Speakman dissents from this determination.

Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment

Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. § 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also the way he performs such work. [redacted] argues his service was performed under the direction and control of CSXT because he was governed by CSXT rules, his locomotive was dispatched by CSXT dispatchers, interchanged cars with CSXT, and he held a Federal Railroad Administration license. However, as locomotive engineer [redacted] provides passenger rail service according to the schedule set by SF RTA, which also provides the locomotive. His working hours and compensation are evidently set by Herzog Transit, which directly compensates him for his services. Though he is subject to CSXT employee rules, he is also subject to safety plans and operating policies of SF RTA. The majority of the Board finds that the evidence does not establish that [redacted] is subject to CSXT directions to a degree that his service is controlled by that company rather than by Herzog Transit or SF RTA. Accordingly, the control test in paragraph (A) is not met.

The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. However, the majority of the Board, Labor Member dissenting, finds that under the Eighth Circuit decision in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, supra, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. B.C.D. 03-01 *Training Consulting Connection.*

It is true that CSXT uses in its freight carriage the rail line on which [redacted] operates a locomotive, and in that sense he works on the property used by a rail carrier employer. However, CSXT shares the line with Herzog Transit, and when [redacted] works as a passenger engineer, the rail line is not being used in CSXT's freight business but in the passenger service provided by Herzog Transit and SF RTA. The majority of the

Board finds that [redacted] in the regular course of his employment operates passenger equipment not part of the CSXT freight service. The evidence of record also supports a conclusion that Herzog Transit is a truly independent business. Though Herzog Transit does not own the passenger equipment or the rail line it operates for SF RTA, it conducts operations in California, New Mexico and Texas which have no relation to the service in Florida for SF RTA. The majority of the Board finds that Kelm would prevent the application of paragraphs (B) and (C) of the definition of covered employee to attribute [redacted] work for Herzog Transit to CSXT.

Accordingly, it is the determination of the majority of the Board, Labor Member Speakman dissenting, that service performed by [redacted] to Herzog Transit is not covered under the Acts as service to CSXT.

Michael S. Schwartz

V. M. Speakman, Jr.
(concurring in part and dissenting in part)

Jerome F. Kever
(concurring in part and dissenting in part)

Attachment: Report of Hearing Examiner (April 30, 2007)

SEPARATE OPINION OF
V. M. SPEAKMAN, JR.
LABOR MEMBER

EMPLOYER STATUS DETERMINATION
Tri-County Commuter Rail Organization
South Florida Regional Transportation Authority
Trinity Railway Express-Train Dispatching
Herzog Transit Services, Incorporated

EMPLOYEE STATUS DETERMINATION
[redacted]

I feel compelled to comment on certain aspects of the thorough and thoughtful Report of the Hearing Examiner on the above-captioned matters. A Majority of the Board has adopted the Hearing Examiner's findings with regard to the commuter operations of South Florida Regional Transportation Authority and Herzog Transit Services under the Railroad Retirement Act and Railroad Unemployment Insurance Act.

I.

I support the United Transportation Union's position with respect to the operations of these entities: namely, that the South Florida Regional Transportation Authority (SF RTA) and its lessee operator Herzog Transit Services (Herzog Transit) are covered under the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA) by virtue of 49 U.S.C. 10501(c)(3)(A).

Under this language, set out on page 31 of the Hearing Examiner's Report, all local governmental agencies providing mass transit by rail are subject to retirement and unemployment systems provided for rail employees, i.e., the RRA and RUIA. The UTU position places all commuter operations operated by local governmental entities on the same footing, and corrects an anomaly recognized by the Hearing Examiner.

The Hearing Examiner's conclusions create two classes of commuter operations. Under the Hearing Examiner's rationale, if a governmental authority assumes rail passenger commuter operations previously conducted

by a rail carrier, which was covered as an employer under the RRA and RUIA, then (c)(3)(A) requires that operation to continue to be covered by the RRA and RUIA, without regard to whether the operation would be exempt from jurisdiction of the Surface Transportation Board (STB). (Report, page 31). However, a newly established operation must show that it would have been subject to the jurisdiction of the Interstate Commerce Commission (ICC) prior to January 1, 1996, in order to be presently subject to STB jurisdiction and, thus, covered under the RRA and RUIA. Consequently, employees are covered under the RRA or RUIA not based upon the type of work they do but on whether it is a legacy or newly started operation. This, to me, is not a sensible result.

Furthermore, under the Hearing Examiner's analysis, commuter operations can be covered or not covered based upon the status of the operating entity under the RRA and RUIA, apart from the operation in question. For example, if SF RTA had contracted out the operations in question to Amtrak, the employees in question would be covered under the RRA and RUIA because Amtrak is a covered employer under those statutes by virtue of its interstate passenger operations. An even more anomalous result would have occurred had SF RTA contracted with Herzog Transit's subsidiary, Transit America LLC, to operate the commuter line. Transit America LLC was found to be a covered employer under the RRA and RUIA by virtue of its operation of a 2.6 mile line of rail in Buchanan County, Missouri. (Report, finding 38, page 24 and B.C.D. 03-10). Any employee hired by Transit America LLC to operate SF RTA commuter line would be covered under the RRA and RUIA by virtue of its operations in Missouri, not in Florida, even though employees of its parent, Herzog Transit, would not be covered while performing the same work.

The Hearing Examiner concedes that standing alone (c)(3)(A) dictates that, regardless of STB jurisdiction, employees of government entities conducting mass transit by rail (and their contractors) are subject to the RRA and RUIA. (Report, page 31). To me, this is the better result.

Even under the analytical frame work established by the Hearing Examiner, Herzog Transit's operations in Florida have sufficient connections with interstate commerce, such that they would have been under the jurisdiction of the ICC prior to the ICC Termination Act of 1995. The SF RTA line is physically connected to the interstate rail system and is used for interstate traffic by CSXT and Amtrak. Passengers may make a connection to and

from Amtrak and the SF RTA by using five shared train stations (Report of Hearing Examiner, page 45). SF RTA commuter trains cannot move unless dispatched by CSXT dispatchers (Report of Hearing Examiner, Finding 18, page 14). Thus, I would find that even accepting the Hearing Examiner's statutory interpretation as correct, SF RTA and Herzog Transit are covered under the RRA and RUIA by virtue of 49 U.S.C. 10501(c)(3)(B).

II.

The Hearing Examiner finds that Herzog Transit is under common control with an employer covered by our statutes; namely, its subsidiary Transit America LLC., and finds that it performs services in connection with railroad transportation. That is, it operates a multi-state system of commuter operations by rail. Nevertheless, he finds that he is prevented from finding Herzog Transit covered under section 1(a)(1)(ii) of the RRA and section 1(a) of the RUIA because of the Board's decision in *VMV Enterprises, B.C.D. 93-79.* In that decision, from which I dissented, a Majority of the Board determined that to fall within the non-carrier provision of the RRA and RUIA, the non-carrier affiliate must provide more than a minimum of services to its carrier affiliate. Since Herzog performs no services for its carrier affiliates, he finds that Herzog Transit is not covered as a non-carrier affiliate (Report of Examiner, Conclusion of Law 5, page 27).

As I indicated in my dissent in *VMV Enterprises*, there is nothing in the RRA, RUIA, or their regulations which even suggests that the services in connection with railroad transportation performed by a non-carrier affiliate must be directed at all toward its affiliate carrier. This was indirectly noted in *Livingston Rebuild Center v. Railroad Retirement Board, 970 F.2d. 295,296 (1992)* wherein the court stated "Although the Center is thus not a captive in the sense that is devoted predominantly to serving one railroad's needs, it is nonetheless 'under common control with' MLR, making it a statutory 'employer 'if rebuilding rolling stock is a 'service***in connection with the transportation of persons or property by railroad." Thus, I would conclude that Herzog Transit is an employer covered by the RRA section 1(a)(1)(ii) and RUIA section 1(a) as a non-carrier affiliate.

V. M. Speakman, Jr.

IN RE Employer Status of Herzog Transit Services, Inc.	))))	Before the United States Railroad Retirement Board Docket. No. 05-CO-0038

REPORT OF HEARING EXAMINER

APRIL 30, 2007

Karl T. Blank
Office of General Counsel
Railroad Retirement Board

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2. The changes in the operations of Herzog Transit Services Inc. since the Board issued B.C.D. 94-109 do not render Herzog Transit an employer covered by the Acts as a non-carrier affiliate which is under common control with a rail carrier employer because Herzog Transit Services Inc. does not provide services to its affiliated rail carrier company.
3. Since the Board issued B.C.D. 94-109, Herzog Transit Services Inc. has contracted to operate the Trinity Railway Express in Dallas-Fort Worth, Texas, over a rail line which is directly or indirectly owned by Dallas Rapid Transit. The dispatching of interstate freight and passenger trains which Herzog Transit performs for Dallas Rapid Transit as part of this contract constitutes active rail carrier operation of the Dallas Rapid Transit rail line as the owner/lessor. The employees of Herzog Transit Services Inc. who dispatch train service must be reported to the Board as in the service of a rail carrier employer under the Acts. The Board should render an separate initial decision regarding whether Herzog Transit or Dallas Rapid Transit is the employer required to report the employees who perform this service.

SUMMARY OF EXAMINER'S REPORT

The body of this Report consists of four segments: Course of Proceedings, Findings of Fact, Conclusions of Law, and Discussion and Analysis.

The first segment, Course of Proceedings, provides a chronology of the actions taken by the various offices of the Board leading to the decision of the Board in B.C.D. 94-109, the employee requests which lead to Board Order 06-12

appointing me as Hearing Examiner, and steps I have taken to hold the hearing and produce this Report.

The Findings of Fact segment contains 41 numbered paragraphs, organized under four sub-headings. Each numbered paragraph summarizes my finding as to evidence of record concerning an aspect of this matter. In order to provide a basis for comparison between the operations of Herzog Transit before and after the Board rendered B.C.D. 94-109, paragraphs 1 through 12, under the heading "Formation and Operation of South Florida Regional Transportation Authority", recount the history of commuter service in the Miami, Florida area before Herzog Transit Services assumed the operation, describe the physical property operated, and the relationship with the State of Florida, CSX Transportation, and Amtrak. Paragraphs 13 through 23, under the heading "Herzog Transit Operations for South Florida Regional Transportation Authority", describe how Herzog Transit now conducts the rail passenger operation for SF RTA. Paragraphs 24 through 32 , under the heading "Herzog Transit Operations Outside Florida", describe the new business the company began since 1994 in other states. Paragraphs 33 through 41, under the final heading "Operations of Other Herzog Companies Outside Florida", describe the rail carrier operations of Herzog Transit affiliates Transit America LLC and Transit America Services, Inc.

The third segment of the Report, Conclusions of Law, states the legal standards applied to reach the recommended decisions These standards define intra-state passenger rail carrier, services necessary for coverage as a non-carrier affiliate company covered as an employer under the Acts, and conduct of train

dispatching as rail carrier operation in the context of a leased rail line.

The fourth segment of this report, Discussion and Analysis, sets forth my analysis of the statutes, court cases and prior agency decisions from which I derived the foregoing legal standards, and applies these standards to the facts of record to explain my recommended decision. The Discussion and Analysis segment is divided into three parts, corresponding to the three recommendations of this Report.

Part I of the Discussion and Analysis segment explains why Herzog Transit is not a rail carrier employer under the RRA and RUIA, using a two-part formula applicable to intrastate passenger commuter operations which is specified by section 10501(c)(3) of U.S. Code, Title 49. Herzog Transit fails the first step because none of the commuter operations it conducts were previously operated by a rail carrier subject to the RRA and RUIA. Herzog Transit fails the second step because its commuter operations do not meet the standards applied prior to the ICC Termination Act of 1995 to determine Interstate Commerce Commission jurisdiction over intrastate passenger service.

Part II of the Discussion and Analysis segment explains why Herzog Transit is not an affiliated non-carrier employer under the RRA and RUIA by reason of the track and signal maintenance services Herzog Transit performs for Trinity Railway Express in Texas and for Rail Runner Express in New Mexico, and the car repair services it performs for New Jersey Transit Rail Operations and North Carolina Department of Transportation "Piedmont" passenger service. Though the General Counsel determined in1971 in *Staten Island Rapid Transit*

Operating Authority, that track maintenance and other services performed by an intrastate commuter operator for an unaffiliated freight rail carrier also using the rail line constituted services in connection with railroad transportation, the Board's 1993 *VMV Enterprises* decision requires the non-carrier provide "more than minimal" services to a rail carrier affiliate. Because Herzog Transit performs no service to an affiliated rail carrier, it does not perform "services" under the Acts.

Part III of the Discussion and Analysis explains why the interstate freight train dispatching which Herzog Transit performs as operator of Trinity Railway Express for rail line owner Dallas Area Rapid Transit is rail carrier service under the RRA and RUIA. Prior Board decisions in *Railroad Ventures* and *Southern California Regional Rail Authority Dispatching Department* require that train dispatching over DART's rail line constitutes active operation of that line by either DART or Herzog Transit as a "lessor" rail carrier. Because this Report is focused on Herzog Transit's Miami operation for SF RTA, however, I recommend a separate initial determination be rendered as to whether this service is attributable directly to rail line owner DART, or indirectly through line operator Herzog Transit.

Following the Conclusion, I have provided a Table of Authorities cited in the Report, which includes a list of the agency coverage decisions, most of which I have also included as exhibits in the administrative record. Finally, I have prepared as the Appendix two charts which summarize the commuter operations

of Herzog Transit, and the ownership structure of relevant Herzog Transit companies.

COURSE OF PROCEEDINGS

The Board's Deputy General Counsel determined1 in Notice No. 89-35, dated April 19, 1989, (Exhibit 53) that the operation by Tri-County Commuter Rail Organization, (now known as South Florida Regional Transportation Authority), under contract with UTDC Transit Services, Inc., was not an employer covered by the Acts because Tri-County and UTDC conducted only intrastate commuter service, and interstate freight service remained with CSXT.

Approximately five years later, on March 31, 1994, the General Chairperson of the United Transportation Union wrote to the Chief of the Board's Employment Accounts Section, stating that Tri-County now operated commuter rail service through a contract with Herzog Transit Services Inc., and requested that the Board consider whether the employees providing passenger service now performed creditable railroad service under the Acts. (Exhibit 3). On May 13, 1994, Mr. Robert A. Scardelletti , International President of the Transportation Communication International Union, also wrote to inform the Chief of the Board's Audit and Compliance Division that Herzog Transit had bid on operation of a commuter operation in California. (Exhibit 4).

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1 Prior to February 5, 1992, regulations of the Board provided that initial determinations of employer and employee status were made by the Deputy General Counsel, subject to final appeal to the three-member Railroad Retirement Board itself. 20 CFR 259.1 (1991). Where no administrative appeal was taken, the decision by the Deputy General Counsel became the final decision of the Board. 20 CFR 259.7(1991).

On December 5, 1994, the Board determined Herzog Transit not to be a covered employer under the Acts. See: *Herzog Transit Services, Inc,* B.C.D. 94-109. (Exhibit 1). The Board found that although the commuter rail operation rendered Herzog Transit a rail carrier, it was not engaged in interstate commerce.

Beginning November 2003, a number of Herzog Transit employees began writing letters requesting that the Board reopen its prior decision. (Exhibits 8, 10, 13, 14, 18, 20, 22, 29, 30, 32, 33). [redacted] also individually claimed in a letter received in December 2003 that his operation of a locomotive for SF RTA actually constituted service as an employee of CSXT Transportation. (Exhibit 15). On December 17, 2003, the Board directed the Chief of the Audit and Compliance Section to review whether [redacted] service would be creditable under the Acts. (Exhibit 16).

The Chief of Audit and Compliance wrote to the SF RTA and to Herzog Transit. The Deputy Executive, Jack L. Stevens, responded by letter dated March 8, 2004. (Exhibit 36). Herzog Transit replied by letter dated July 22, 2004, from Vice President Norman Jester. (Exhibit 38). After review of the information from the employees, from SF RTA and from Herzog Transit, on February 2, 2006, the Board by Board Order 06-12 appointed the undersigned, Karl T. Blank, to serve as a Hearing Examiner pursuant to section 258.1 of the Board's regulations (20 CFR 258.1). The Board directed the Examiner to conduct a hearing for the purpose of obtaining testimony and documentary evidence, and to prepare a recommendation as to "whether there has been a change in the

operations of Herzog Transit Services, Inc., which would affect its status as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts, as determined in Board Coverage Decision 94-109."

The Hearing Examiner on February 2 notified Herzog Transit Services that the Board had determined a hearing should be held. On March 23, 2006, the Examiner provided a copy of 63 Exhibits, constituting the documentary evidence in the administrative record and related agency coverage rulings, to counsel for Herzog Transit and to employees and the UTU as designated by the Board in B.O. 06-12. Notice of the hearing was published in the Federal Register on April 27, 2006, (71 Fed. Reg. 24875), and the hearing was held in the Federal building at 51 SW 1st Avenue in Miami, Florida on May 16, 2006. Both Herzog Transit and the United Transportation Union appeared and were represented by counsel. [redacted] and [redacted] testified on behalf of the employees, and [redacted] testified for Herzog Transit. At the hearing the employees presented Exhibits 64 through 76, and Herzog Transit submitted Exhibits 77, 78 and 79.

Following the hearing, the Hearing Examiner added prior agency coverage decisions as Exhibits 80 and 81. Herzog employee [redacted] submitted a letter and 20 additional photographs on May 30, 2006, which was entered as exhibit 85. Counsel for Herzog as agreed at the Hearing, provided a complete copy of the current Herzog Transit/SF RTA contract (Exhibit 82), the STB decision regarding purchase of the right of way for the New Mexico commuter operation (Exhibit 84), and a corporate organization chart and list of corporate

officers (Exhibit 86). The Hearing Examiner furnished a copy of the hearing transcript on June 27, 2006 to counsel for both Herzog Transit and UTU, and to the designated Herzog employees. The employees added two letters (Exhibits 87 and 88). Counsel for UTU and Herzog Transit submitted post-hearing briefs on August 1, 2006 and July 31, 2006, respectively. The Hearing Examiner then added as the final Exhibit copies of the Board Coverage Decisions cited by Herzog Transit in its brief (Exhibit 89), and notified Herzog Transit, the UTU, and the employees that the record closed on August 18, 2006.

FINDINGS OF FACT

A. Formation and Operation of South Florida Regional Transportation Authority.

1. On May 11, 1988, the Florida Department of Transportation (FDoT) began the groundwork for commuter rail service in the Miami area by purchasing from CSXT Transportation (CSXT) a total of 76.10 miles of track, from mile post 965 at West Palm Beach in the north to mile post 1041.1 at Miami in the south, with the right of way, track, signals, bridges and other fixed facilities, including the Hialeah rail yard. (R. 377, 382)2 The purchase agreement required CSXT to maintain all rail facilities, and permitted CSXT to retain "a perpetual use easement with the common carrier obligations." Florida also purchased locomotives and passenger cars and constructed passenger stations on the line. (R. 381).

2. Florida formed Tri-County Commuter Rail Authority (Tri-County) to implement a complete rail and bus commuter system for Dade, Broward

2 References to page numbers in the Administrative Record are identified as "R".

and Palm Beach counties. (R. 381) Effective July 2003, Tri-County was renamed the South Florida Regional Transportation Authority (SF RTA). See Florida Statutes §343.52(1) (2005). For simplicity's sake, this Report will refer to the Florida authority established to conduct rail commuter operations by the abbreviation of its present name (SF RTA) both before and after July 2003.

3. On September 27, 1988, FDoT entered into a contract with UTDC Transit Services, Inc., to provide commuter rail operations between West Palm Beach and Miami. (R. 381). Commuter rail service over 66.46 miles (from mile post 970 in West Palm Beach running south to mile post 1036.46 at Miami) began January 9, 1989. (R. 382).

4. Neither FDoT, SF RTA, nor UTCC filed any notice with the former Interstate Commerce Commission regarding commencement of rail operations, in the belief that the commuter train service was an intrastate passenger operation not subject to the Interstate Commerce Act. (R. 382).

5. In June 1989, the United Transportation Union (UTU) and the Transportation Workers Union of America both filed petitions with the National Labor Relations Board (NLRB) to represent employees of UTDC pursuant to the National Labor Relations Act (29. U.S.C. § 151 et seq.). In a post-hearing brief before the NLRB, UTU stated that "it does not appear that the trackage rights or lease arrangements with CSX Transportation, Inc., are of such character so as to bring the employees and employer within the definitional provisions of the Railway Labor Act." (R. 1201-02)

6. As a result of the UTU and TWU petitions, in September 1989 the NLRB requested the opinion of the National Mediation Board as to whether the UTDC employees were subject to the Railway Labor Act rather than the National Labor Relations Act. The National Mediation Board determined on August 6, 1990 that UTDC Transit did not conduct rail carrier service subject to the Railway Labor Act. (UTDC Transit Services, Inc., 17 NMB 343 (1990) (R. 385-410)

7. Passenger service by SF RTA has remained essentially the same since it began in 1989. (R. 141, 142, 149, TR. 20)3. Passenger trains operate 365 days a year over 72 miles of the FDoT track to 18 stations. Twenty-eight passenger trains run on week days, 14 on Saturdays, and 12 on Sundays and Holidays. (R. 141). The SF RTA locomotive roster is ten General Motors Electro-Motive Division model F 40 diesel locomotives, and a passenger car fleet of 26 passenger coaches and coaches with cabs. (R. 1361) FDoT continues to own the track, which is designated as the "South Florida Rail Corridor", and to contract with CSXT for freight service and maintenance of way. (R. 141, 229).

8. SF RTA uses two railroad yards. A yard in West Palm Beach is used exclusively by SF RTA as storage for rolling stock (TR 163). The railroad yard at Hileah is jointly used by SF RTA, CSXT, and Amtrak. Each entity uses its own section, with the CSXT portion being the largest. (TR 151-52). An aerial view of the yard would give the appearance of a unified operation. (TR 152) The Hileah facility includes a two-story office

3 Pages of the transcript of the May 16, 2006 hearing are identified by "TR".

building occupied jointly by the SF RTA contract operator and by CSXT. (TR 105).

9. Amtrak interstate passenger trains run on the South Florida Rail Corridor track between the Miami station in Hileah, continuing northward off FDoT tracks toward Washington, D.C. and beyond (TR 163). SF RTA passengers may embark on or de-train from Amtrak trains at five stations: West Palm Beach, Delray, Deerfield Beech, Hollywood, and Ft. Lauderdale. (R. 149). Based on crew observations of passengers traveling with large amounts of luggage, an average of 5 to 10 passengers per commuter run are leaving for or returning from Amtrak travel. (TR 50). Three stations connect by bus shuttle to airports. (R. 51, 95).

10. When a passenger holding an Amtrak ticket misses the Amtrak train, the SF RTA train will on a regular basis honor the Amtrak ticket without additional fare if it is possible to get that passenger to the next Amtrak stop. (TR 67). Less frequently, a SF RTA passenger may mistakenly board an Amtrak train, and be allowed to travel on Amtrak to a station where transfer to SF RTA is possible. (TR 68). However, SF RTA has no agreement to issue tickets good for interstate travel on Amtrak, and Amtrak has no ticketing agreement with SF RTA. (R. 141, 150, TR 76).

11. CSXT interstate freight service continues to use the entire line, other than the passenger terminal. (TR 163).

12. FDoT, as owner of the rail line, separately contracts with CSXT to

dispatch all trains on the rail line including CSXT freight, Amtrak interstate passenger, and SF RTA commuter trains. The CSXT dispatchers are located in Jacksonville, Florida. (R. 156, R. 220).

B. **Herzog Transit Operations for South Florida Regional Transportation Authority.**

13. On July 28, 1993, Herzog Contracting Corporation (Herzog Contracting) incorporated Herzog Transit Services, Inc., (Herzog Transit) as a Missouri corporation 90 percent owned by Herzog Contracting and 10 percent by Dr. William Ronan. (R. 8, 13). At the time, Herzog Transit and Herzog Contracting shared "some" officers and directors. (R. 8). Herzog Contracting and Herzog Transit are headquartered in St. Joseph, Missouri. (TR 173).

14. Herzog Transit purchased the assets of UTDC Transit Services and began passenger service operation under contract with SF RTA on January 7, 1994. At that time, Herzog Transit had no contract other than its agreement with Tri-County. (R. 8). The current contract between Herzog Transit and SF RTA took effect November 1, 2002, and runs through June 30, 2007. (R. 1279). Other than noted below, the current contract does not differ materially from the 1994 contract.

15. Herzog Transit must maintain equipment as required by SF RTA and the Federal Railway Administration (FRA), the Passenger Rail Equipment Safety Standards promulgated by the American Public Transportation Association, and other applicable standards and

regulations. Herzog Transit formerly maintained passenger stations and adjacent landscaping, but was outbid for this work in July 2005. (R. 1372; TR. 151).

16. Herzog Transit is responsible for the operations of the commuter rail service in accordance with CSXT Transportation Operating Rules or other applicable Operating Rules designated by SF RTA; applicable federal, state and local laws and regulations; equipment operation instructions issued by or approved by SF RTA; SF RTA train schedules or timetables; and SF RTA passenger service policies as may be amended. (R. 1351).

17. Herzog Transit train and engine service employees must be qualified under FRA rules, and comply with FRA Drug and Alcohol testing requirements. They must meet any qualifications required by law, and must undergo continuing training programs. The train crew must also, pursuant to paragraph 3.12.9 of the contract, inspect each train, including brake systems and cable connections, prior to beginning the run. (R. 1354). They may also switch and couple cars in and out of the train consist, reconnect brake lines and electric cables, and change control cabins. (R. 1352).

18. Herzog Transit must conduct operations under the coordination of CSXT dispatchers, and maintain communication with CSXT, Amtrak, and SF RTA (R. 1356). All train movements in the Hileah yard are controlled by the CSXT yardmaster in the Hileah yard (TR 94, 105, 155), and all

movement over the South Florida Rail Corridor, whether by Herzog Transit, by Amtrak, or by CSXT is controlled by CSXT dispatchers in Jacksonville using electronic signal lights. (TR. 156). In addition, the Herzog Transit crew is in direct radio contact with the CSXT dispatcher, and with Herzog Transit Operations Center. (TR. 160-161).

19. Herzog Transit is required to establish and staff on a 24-hour basis an Operations Center, which is located in the two story office building in the Hileah yard. (R. 1352, 1356, TR 163). The Operations Center monitors both SF RTA and freight traffic, and notifies the CSXT dispatcher when Operations Center instruments show freight interference will affect SF RTA trains. (TR 159). The Operations Center also announces service delays over the public address system installed at SF RTA stations. (TR 160). When a Herzog Transit crew observes an incident affecting train movement, the crew first notifies the CSXT dispatcher, then Herzog Operations Center. (TR 161). While the Operations Center may contact CSXT dispatchers or Amtrak officials, it is not authorized to directly contact CSXT or Amtrak trains, and it is unlikely to do so. (Id.) The Operations Center does not dispatch trains.

20. At the hearing, the Herzog Transit employees introduced series of documents which each train crew must receive: "CSXT System Bulletins" (Ex. 73, R. 1083-1133), "CSXT Jacksonville Division Bulletins" (Ex. 74, R. 1134-1175), and "CSXT Dispatcher's Bulletins, Hileah Station" (Ex. 75, R. 1176-1198). While these documents convey specific information

regarding track conditions or speed limitations over particular stretches of rail line, these do not constitute the authorization for train movement. Train movement is authorized only by the electronic signal system and CSXT dispatchers. (TR. 156-157).

21. At the hearing, Herzog employees introduced a collection of 113 letters to substantiate the claim that SF RTA and Herzog Transit engage in interstate rail carrier operations. (TR. 23, Ex. 64, R. 446-553). These letters include statements that SF RTA equipment is sent out of state for "major repairs and renovations" and that rail cars are delivered by CSXT with supplies for Herzog Transit use. (R. 462, 473, 476) On one occasion, CSXT work crews used two SF RTA locomotives for ballast work on the rail line (TR 93). Herzog Transit has also received equipment from other companies for repairs through the connection with CSXT. (R 509, 510, 513) Herzog Transit employees have also used SF RTA equipment to move disabled CSXT and Amtrak locomotives and trains on the shared South Florida Rail Corridor main line (TR. 92, Ex. 64, R. 480-482, 543). Herzog Transit employees have worked in the portion of the Hileah yard used by CSXT with CSXT equipment, washing, fueling and repairing SF RTA equipment. (R 550, 558, 555). SF RTA has installed a wheel-truing shop in the Hileah yard which has been used to repair equipment of interstate rail carriers (TR 153, R 509, 605).

22. Photographs by Herzog Transit employees show a locomotive from Colorado (the "Bombardier jet engine") brought to the Hileah yard (R.

72, 74, TR 96, 98). With the locomotive, CSXT brought two flatbed freight rail cars used as "idlers" coupled between the inactive locomotive and the powered locomotive as buffers and to allow better visibility (R. 72, 77; TR. 97). The locomotive and flatcars have been stored for some years, and the locomotive remains. One of the "idler" flatcars had mechanical defects which were corrected by Herzog Transit mechanics to "get rid of it" (TR. 154).

23. Herzog Transit has no freight interchange agreement with any entity, and there is no evidence that any movement of freight rail cars has been accompanied by waybills or bills of lading. (TR 165).

C. **Herzog Transit Operations Outside Florida.**

24. Since the Board rendered B.C.D. 94-109 in December 1994, Herzog Transit has engaged in six new operations in other states. Four provide rail passenger service: Trinity Railway Express in Texas; Altamont Community Express and Waterfront Red Car Line in California; and Rail Runner Express in Albuquerque, New Mexico. The two other new operations only maintain rail passenger cars and locomotives: New Jersey Transit in Atlantic City and North Carolina DoT. (TR 127-131).

25. Herzog Transit began commuter rail operations in Texas in the Dallas-Fort Worth vicinity for Trinity Railway Express (Trinity) in late December 1996 (R. 314), two years after the Board's decision in B.C.D. 94-109. Trinity is a cooperative service provided by the Fort Worth Transportation Authority ('the T') and Dallas Area Rapid Transit ('DART')".

(R. 314). DART, directly or through a subsidiary, acquired approximately 120 miles of track from the Southern Pacific Transportation Company and from the Missouri Pacific Railroad in 1988 and 1989. (R.332). Trinity links downtown Fort Worth, downtown Dallas, and DFW airport, using approximately 34 miles of track, and sharing the Fort Worth Intermodal Transportation Center and the Dallas Union Station with Amtrak intercity service. (R. 149, 314) Trinity operates 13 rail diesel cars, 6 diesel-electric locomotives, 10 bi-level coach cars, and 7 cab cars. (R. 314). Trinity carried approximately 176,000 passengers the first full year of operation in 1997, and reached 2.16 million passengers in 2004. (R. 314). Trinity has been determined not to be a covered employer subject to the RRA and RUIA. See Notice No. 91-66, *Dallas Area Rapid Transit*. (R. 321-322).

26. Herzog Transit initially only operated Trinity commuter passenger trains over the Dallas-Ft. Worth main line, while the Burlington Northern Santa Fe dispatched freight and passenger trains. Sometime after 2000, Herzog Transit assumed the dispatching services from a facility located in Irving, Texas which is owned by Trinity. Herzog Transit also assumed maintenance of way at that time. (TR 169, R. 1793, 1832). Herzog Transit commuter service uses and maintains the equipment provided by Trinity (R. 1804-1811), and runs on timetables approved by the transit authorities. Herzog Transit's rail commuter operation is governed by applicable rules or regulations of the Federal Railroad Administration (FRA); the FRA-approved General Code of Operating Rules; Herzog

Transit's rules; and freight agreements, evidently between DART, the T, BNSF Railroad, Union Pacific Railroad, and a short line carrier. (R. 1799, 1831, 1841, TR. 167). Herzog Transit currently dispatches all trains, including freight and Amtrak interstate passenger service. (R. 151).

27. In October 1998, almost four years after the Board's decision in B.C.D. 94-109, Herzog Transit began operating the Altamont Commuter Express (ACE) under an agreement with San Joaquin Regional Rail Commission (SJ Rail Commission) which has been extended through 2009. (TR. 170, R. 310-313). The SJ Rail Commission is the managing agency of the Altamont Commuter Express Joint Powers Authority, formed by the California counties of Alameda, San Joaquin, and Santa Clara, and funded by a regional sales tax and Federal grants. (R. 345). ACE provides rail commuter service over an 86 mile route which is owned by the Union Pacific Railroad and lies entirely in California, between Stockton and San Jose. (R. 311, 345, 348). The Union Pacific maintains the track. (R 311) ACE owns five F40PH diesel electric locomotives and 20 bi-level passenger coaches. (R. 311). Herzog Transit maintains this equipment. (R. 311, 349). At the Diridon station in San Jose, passengers may connect with Amtrak trains. (R. 150, 345; TR. 170). Freight service over the line is conducted by Union Pacific Railroad. (TR. 171). Union Pacific dispatchers control train dispatching of ACE, Amtrak and UPRR trains over all but 3 miles of the line from UPRR's train dispatching center in Omaha, Nebraska; the remaining 3 miles are controlled by Amtrak

dispatchers. (R. 151, 311, TR 172). The Board has not ruled on the status of ACE or SJ Rail Commission under the RRA and RUIA.

28. On or about September 6, 2002, Herzog Transit contracted with the Port of Los Angeles to operate the Port of Los Angeles Waterfront Red Car Line passenger service in San Pedro, California (Waterfront Red Car). (R. 1228, TR. 147). Operation began in July 2003, approximately eight and one-half years after the Board's decision in B.C.D. 94-109. Waterfront Red Car uses one vintage restored electric trolley car and one new trolley car to carry passengers along the cruise ship terminal area over 1½ miles of track owned by the Port. (TR. 147-149). Herzog Transit maintains this equipment, including the catenary power line and track. (R. 1232-1233). Union Pacific Railroad conducts diesel electric locomotive freight service over the same line to international shipping docks in the Port (TR 147-149). Because the agreement between Port of Los Angeles and Herzog Transit refers to another document, it is unclear which entity dispatches trains over the line. (R. 1231). The Board has not ruled on the status of Port of Los Angeles or Waterfront Red Car as covered employers under the RRA and RUIA.

29. On or about September 1, 2005, Herzog Transit contracted with the Mid-Region Council of Governments, New Mexico (MR COG), to operate the New Mexico Rail Runner Express (Rail Runner Express) for the Mid-Region Transit District. (R. 411, 1211-1227). At the time of the May 2006 hearing by the Hearing Examiner in this case, Rail Runner Express was

still in the mobilization phase (R. 411, TR. 129, 146). Service began over a 50 mile segment between Bernalillo and Belen, north of Albuquerque, on July 14, 2006. See: nmrailrunner.com/FAQ (Feb. 26, 2007). Additional segments will be phased into use over several years. The provisions of the MR COG/Herzog Transit contract are essentially the same as those of the SF RTA contract. (R. 1205-1227). Herzog Transit must maintain rolling stock and the right of way (R. 1213-1214). Dispatching for Rail Runner Express commuter trains, BNSF freight trains, and Amtrak interstate passenger trains will initially be provided by BNSF, but may be performed by Herzog Transit upon sufficient notice by MR COG. (R. 1210).

30. MR COG is composed of a number of local governments, including the City of Albuquerque. The Mid-Region Transit District is itself a political subdivision of New Mexico organized pursuant to the New Mexico Regional Transit Act (N.M. Stat. §§ 73-25-1 to -18)(2007)). During 2005 the state of New Mexico Department of Transportation (NM DoT) agreed with the BNSF Railroad to purchase on behalf of MR COG and for use by Mid-Region Transit approximately 297 miles of track between Belen, New Mexico, and Trinidad, Colorado. (R. 411) NM DoT built 9 station platforms, and purchased 5 diesel locomotives and 10 bi-level passenger coaches. (R. 411). On February 3, 2006, the Surface Transportation Board ruled that because BNSF transferred only the right of way but retained the obligation to provide freight service, the transaction was not subject to STB jurisdiction. New Mexico Department of Transportation—

Acquisition Exemption—Certain Assets of BNSF Railway Company, STB Finance Docket No. 34793, (R. 1916). The Board has not ruled on the status of NM Dot, Mid-Region Transit District or Rail Runner Express as employers covered by the RRA and RUIA.

31. Herzog Transit has contracted with two State agencies to maintain equipment. (TR 149). Herzog Transit maintains modern diesel electric passenger coaches for New Jersey Transit at a Atlantic City location. Maintenance includes daily inspections, light running repairs, and cleaning. (TR 149-50). New Jersey Transit Rail Operations has been held a covered rail carrier employer under the Acts. See: Legal Opinion L-83-59, *New Jersey Transit Rail Operations, Inc.* (R. 439-432).

32. Herzog also has a contract to maintain equipment used by the "Piedmont" passenger service funded by the North Carolina Department of Transportation (NC DoT) (TR131, 149-150). The Piedmont conducts regularly scheduled passenger service between Charlotte and Raleigh in central North Carolina. Amtrak operates the service using traditional passenger coaches provided by NC DoT Rail Division. (TR. 149, see also the Piedmont service internet site bytrain.org/passengers/routes/piedmont, Feb. 27, 2007). The status of NC DoT as a covered employer under the RRA and RUIA has not been considered.

D. Operations of Other Herzog Companies Outside Florida.

33. The Herzog corporate family includes at least 21 companies (R. 1934). Six of these companies relate to the issue of whether Herzog

Transit is a covered employer under the RRA and RUIA: Herzog Contracting Corporation; Herzog Stone Products, Inc.; Herzog Services, Inc.; Arkansas Central Railway Company; Transit America, LLC; and Transit America Services, Inc.

34. A coverage investigation by Board staff in 1989 found that Herzog Contracting Corporation owned Herzog Stone Products, Inc. (Herzog Stone), which operated a stone quarry at South Hatton in Polk County, Arkansas. Herzog Stone laid a 1.3 mile line of track in 1986 to connect with Kansas City Southern Railway. (R. 353, 355, 362). Mr. Randy Poggenmiller was Vice President of Herzog Contracting. (R. 356)

35. Herzog Services, Inc. was formed by Mr. Randy Poggenmiller as sole shareholder in 1988 or 1989 to engage in transportation-related activities. Herzog Services in turn formed the Arkansas Central Railway Company (Arkansas Central) as a wholly owned subsidiary to operate the 1.3 mile Polk County rail line owned by Herzog Stone. (R. 355-56) The Interstate Commerce Commission found Arkansas Central to be a rail carrier subject to the Interstate Commerce Act. Arkansas Central Railway Co., Inc.—Operation Exemption—Line of Herzog Stone Products, Inc. Finance Docket No. 31405, May 31, 1989. (R. 362-65). However, Arkansas Central was never determined to be a rail carrier employer covered by the RRA and RUIA because Herzog advised it never began operations. See Deputy General Counsel Coverage Decision L-90-80, *Arkansas Central Railway Company, Inc.* (R. 355-357).

36. Because Arkansas Central was not a rail carrier employer, Herzog Contracting was found not to be under common control with a rail carrier, and consequently not to be a covered employer under the Acts. See Deputy General Counsel Coverage Decision L-90-79, *Herzog Contracting Corporation* (R. 353-354).

37. In 2002, Herzog Transit and Stagecoach Rail North America, LLC, (Stagecoach) formed Transit America LLC under Missouri law as equal 50 percent interest owners. (R. 368). Stagecoach is a division of a public company based in Perth, Scotland, United Kingdom, which operates rail lines in the UK and motor coaches in North America. (R. 371-372). Stagecoach had no relation to any Herzog company beyond the co-interest in Transit America. Stagecoach transferred its 50 percent interest to Herzog Transit in 2004, and consequently Transit America became a wholly owned subsidiary of Herzog Transit. (TR. 144).

38. Herzog Contracting transferred to Transit America the title to a 2.6 mile line of rail east of St. Joseph in Buchanan County, Missouri, which previously operated as a private rail line serving only Herzog Contracting. (R 301-304). In October 2002, the STB granted Transit America an exemption to operate the Buchanan County line as a class III rail carrier. See: Transit America, LLC—Operation Exemption—Line in Buchanan County, MO, Finance Docket No. 34253, 67 Fed. Reg. 64192 (October 17, 2002) (R. 370). Transit America began operations December 9, 2002, with one employee. (R.368). Based on the foregoing, the Board

determined Transit America to be a covered rail carrier employer under the Acts. B.C.D. 03-10 *Transit America LLC.* (R. 366-367).

39. Transit America unsuccessfully bid in 2004 to operate Metrolink commuter rail service under contract with the Southern California Regional Rail Authority (SCal Regional Rail). (R. 413). So Cal Regional Rail had initiated rail commuter operations in the Los Angeles-San Bernardino vicinity in 1994, using Amtrak as the contract operator. B.C.D. 94-116, *Southern California Regional Rail Authority*, (R. 414-416). The Board has determined that SCal Regional Rail is an employer only with respect to the dispatching of rail carrier service over its rail line by Amtrak, Union Pacific Railroad, and BNSF Railroad. B.C.D. 02-12 *Southern California Regional Rail Authority, Dispatching Department*. (R. 417-419).

40. In 2005, Transit America formed a wholly owned subsidiary corporation, Transit America Services, Inc. (TA Services Inc.) (TR. 133). TA Services Inc. is headquartered in Oceanside, California. (TR. 173). On June 8, 2005, Transit America contracted with the new subsidiary corporation, TA Services Inc., to operate the Buchanan County rail line. The Board has determined that TA Services Inc. is a covered rail carrier employer under the Acts. B.C.D. 05-33, *Transit America Services, Inc.*

41. In December 2005, TA Services Inc. replaced Amtrak as contract operator of the rail commuter service (the "Coaster") for North San Diego County Transit District (North County Transit). See: "NCTD to contract with new company", North County Times, December 15, 2005, at

nctimes.com. North County Transit itself, as a public authority which merely owned the line of track, was determined by the Board not to be a covered employer in B.C.D. 95-56, *North San Diego County Transit Development Board.* The *North San Diego County* decision noted that Coaster commuter rail service would be conducted on behalf of the North County Transit by Amtrak, an employer covered under the Acts. Under the December 2005 contract between North County Transit and TA Services Inc., the Coaster commuter rail service continues to be operated by an employer covered by the RRA and RUIA.

CONCLUSIONS OF LAW

Based on the statutes, cases and authorities discussed below, I make the following conclusions of law:

1. An operator of a local commuter passenger rail service is a rail carrier employer under section 1(a)(1)(i) of the Railroad Retirement Act and sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act if it performs transportation provided by a local governmental authority as defined by either paragraph (A) or paragraph (B) of section 10501(c)(3) of Title 49 of the United States Code.
2. To meet the definition provided by 49 U.S.C. § 10501(c)(3)(A) of local authority subject to the Railroad Retirement and Railroad Unemployment Insurance Acts, the commuter rail service conducted by the local authority must have been previously conducted by a rail carrier employer, then assumed by the local authority.

3. To meet the definition provided by 49 U.S.C. § 10501(c)(3)(B) of local authority subject to the Railroad Retirement and Railroad Unemployment Insurance Acts, the commuter rail service must meet the standards for jurisdiction by the Interstate Commerce Commission over passenger rail service as in effect prior to the January 1996 effective date of the ICC Termination Act of 1995.

4. Under the law as in effect prior to January 1996, the considerations for determining that a rail carrier was subject to the jurisdiction of the ICC when that carrier operated entirely within one state and transported passengers but not freight, included: a physical connection of the intra-state carrier track to the interstate rail network; a through-ticketing arrangement with an interstate passenger carrier; direct travel connections and related scheduling of the inter- and intra-state passenger operations to facilitate transfer of passengers between them; whether a significant number of passengers would come from the interstate passenger carrier; whether the intra-state carrier markets itself as more than a local passenger service; and whether passengers of the interstate rail carrier have alternate means to arrive and leave the interstate rail carrier station.

5. A non-carrier company under common control with a rail carrier employer must perform more than a minimal proportion of services in connection with railroad transportation to the affiliated rail carrier in order to be held a covered employer under section 1(a)(1)(ii) of the

Railroad Retirement Act and section1(a) of the Railroad Unemployment Insurance Act.

6. An owner of a rail line which is operated in interstate commerce by another entity is a "lessor" rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts unless three factors are present: the owner/lessor does not have as a primary purpose to profit from railroad activities; the owner/lessor does not operate or retain the capacity to operate the rail line; and the operator/lessee of the rail line is already a covered employer under the Acts.

7. An owner of a rail line which contracts with another to conduct train service, but which dispatches the order and sequence of trains traveling in interstate commerce over its rail line, operates its line as a rail carrier employer under section 1(a)(1)(i) of the Railroad Retirement Act and sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act. If the owner engages in other, non-carrier, business, the dispatching operation may be covered separately as a segregable unit pursuant to section 202.3 of the Board's regulations.

DISCUSSION AND ANALYSIS

I. HERZOG TRANSIT SERVICES IS NOT A RAIL CARRIER EMPLOYER UNDER THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE ACTS AS A CONTRACT OPERATOR OF INTRASTATE PASSENGER COMMUTER SERVICE.

A. An Intrastate Commuter Passenger Rail Carrier Must Meet the Requirements of 49 U.S.C. §10105(c) to be a Rail Carrier Employer Under the RRA and RUIA.

Board Order 06-12, which directed preparation of this Report, limits my inquiry to whether there has been "a change in the operations" of Herzog Transit which would "affect its status as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts since the Board rendered its decision regarding Herzog Transit in B.C.D. 94-109. Because that decision concluded only that Herzog Transit was "not a rail carrier employer", (R. 2), this first segment of my Report will consider whether new facts regarding Herzog Transit operations since 1994 now render it a rail carrier employer under the Acts. The next segment of the Report will then consider whether a change in the operations of Herzog Transit render it an employer under any other provision of the Acts.

A rail carrier employer is defined by section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code * * *.

A virtually identical definition is found in sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a) & (b)). Both Acts thus require reference to the definition of Surface Transportation Board (STB)

jurisdiction found in subtitle IV of title 49 of the U.S.C.

As amended by the ICC Termination Act of 1995, the jurisdiction of the Surface Transportation Board includes rail transportation between a place in "* * * a State and a place in the same or another State as part of the interstate rail network * * *." See 49 U.S.C. §10501(a)(2)(A). The definition thus has two components: rail transportation across state lines, and rail transportation entirely within a single State which is nevertheless "a part of the interstate rail network". A freight carrier located entirely within one State meets the interstate connection when it interchanges freight with interstate trunk rail lines. See: Union Stock Yard & Transit Co. v. U.S., 308 U.S. 213 (1939)(railroad operating entirely within stockyard but interchanging interstate freight held a rail carrier under Interstate Commerce Act). Freight waybills showing shipments of freight consigned to points out of state are sufficient evidence of interstate commerce under the Interstate Commerce Act. Dearing v. United States, 167 F. 2d 310, 311 (10th Cir., 1948).

Intrastate rail transportation of passengers, however, presents a more complex question because the jurisdictional statute for the STB states that "Except as provided in paragraph (3) of * * * [10501(c)], the Surface Transportation Board does not have jurisdiction under this part over mass transportation4 provided by a local governmental authority." 49 U.S.C. § 10501(c)(2). In other words, unless a commuter operation can be fit into following section 10501(c)(3), it is not subject to STB jurisdiction, and

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4 Mass transportation is defined by reference to the Urban Mass Transportation Act, as amended, to be "regular and continuing general or special transportation to the public" (49.U.S.C. § 5302(a)(7)).

consequently is not a rail carrier employer as defined by the RRA and RUIA.

Section 10501(c)(3) is divided into two paragraphs. Paragraph (c)(3)(A) first provides:

> (3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority described in paragraph (2), is subject to applicable laws of the United States related to—
> (i) safety;
> (ii) the representation of employees for collective bargaining; and
> (iii) employment, retirement, annuity and unemployment systems or other provisions related to dealings between employees and employers.

Considered alone, paragraph (c)(3)(A) would seem to provide a simple answer to the question of the status of commuter authorities under the RRA and RUIA: regardless of STB jurisdiction, they remain "subject to" the RRA and RUIA as covered employers.

The second paragraph, (c)(3)(B), however, disarranges this simplicity with the following additional language:

> (B) The Board has jurisdiction under sections 11102 and 11103 of this title [relating to use of terminal facilities and switch connections to branch lines and private track] over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996 [the effective date of the ICC Termination Act of 1995]. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

Paragraphs (A) and (B) of section 10501(c)(3) seem inconsistent. On one hand, paragraph (c)(3)(A) states that all "mass transportation" exempt from STB

jurisdiction by 10501(c)(2) is nevertheless subject to the RRA and RUIA. Paragraph (c)(3)(B) on the other hand, first restores STB authority over a governmental authority which would have been subject to ICC authority applying law prior to the 1995 amendment. Then the paragraph ends by stating that the 1995 amendment is to have no effect on coverage under the Acts administered by the Board. Moreover, because both paragraph (A) and the final sentence of paragraph (B) deal with matters (labor relations and retirement programs) beyond the authority of the STB, they are really addressed to the Board rather than the STB. Did Congress mean through 10501(c)(3) to tell the Board that all commuter passenger operations are covered by the RRA and RUIA without regard to the current limitation of STB jurisdiction by 10501(c)(2)? Or did Congress mean that 10501(c)(3) limits coverage under the RRA and RUIA to those intrastate commuter operators which would have been subject to ICC authority under the law prior to 1995?

If the language of a statute is ambiguous on its face, the legislative history may be considered to help determine its meaning. United States v. Donruss Co., 393 U.S. 297 (1969). Since the ICC Termination Act of 1995 revised 10501 to add paragraph (c), the first source would be the House Conference Report on that legislation. The Conference Report states that paragraph 10501(c) derives from former 49 U.S.C. §10504 "Exempt rail mass transportation"5. A comparison between the former 10504 and current section 10501(c) shows, though, that only

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5 See: H. Rep. No. 422, 104th Cong., 1st Sess. 242; and 49 U.S.C.A. Transportation 10101 to 20100, Interstate Commerce Act Disposition Tables, Table III, p. 17.

the first paragraph, 10501(c)(3)(A), appeared in the prior law. The Conference Report does not discuss the relationship between paragraphs (c)(3)(A) and (c)(3)(B).

The amendatory history of 10501(c) sheds more light. The text of the first paragraph, 10501(c)(3)(A), dates back over 30 years to the Regional Rail Reorganization Act of 1973 (P.L. 93-236, 87 Stat. 985)(the 3-R Act), as amended in 1976. The original 3-R Act reorganized and combined several existing insolvent railroads to create "a rail system in the Midwest and northeast region" to meet the rail transportation needs of the region and the United States as a whole. The resulting "Consolidated Rail Corporation", or Conrail, was allowed to eliminate redundancies from consolidation by abandoning unprofitable freight lines, and by requiring State subsidies to continue commuter passenger service. The 1976 amendments to the 3-R Act, enacted as part of a comprehensive overhaul of the Interstate Commerce Act, allowed local government authorities to purchase the rail passenger facilities and operate the service. The 1976 amendment freed these local authorities from the jurisdiction of the Interstate Commerce Commission rate review, allowing them to set fares as necessary to pay for the assumed operation. At that time, the predecessor section to 10501(c)(3)(A) was also added to the 3-R Act to clarify that though not subject to ICC rate jurisdiction, these transferred passenger operations would continue as a covered employers under the RRA and RUIA.6 In 1982, Public Law 97-449 codified the 3-R Act provision as 49 U.S.C. §10504(c), and restated it in more

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6 See P.L. 94-210 § 804, 90 Stat. 31, at 139, amending section 304(j) of the 3-R Act (P.L. 93-236).

general terms.7 With the 1995 ICC Termination Act, 10504(c) then became the present 10501(c)(3)(A).

Given the broad definition of "mass transportation" exempt from STB jurisdiction under 10501(b), bringing employees of governmental authorities conducting otherwise exempt mass rail transportation within coverage of the RRA and RUIA would conceivably result in coverage of trolley and subway lines. Congress clearly could not have meant this disruption of existing pension and labor relations. Cf. Felton v. Southeastern Pennsylvania Transportation Authority, 952 F. 2d 59, (3rd Cir. 1991) at 65 (noting distinctions between transit employees and Conrail employees transferred to Commuter Rail Division for purposes of the Federal Employers' Liability Act). An interpretation based on the history of the language of paragraph (c)(3)(A) and the limitation of paragraph (c)(3)(B), is that where a government authority assumes rail passenger commuter operations previously conducted by a rail carrier which was covered as an employer under the RRA and RUIA, then paragraph (c)(3)(A) requires that operation to continue to be covered by the RRA and RUIA, without regard to whether the operation would be exempt from jurisdiction of the STB. A newly established operation must under paragraph (c)(3)(B) meet the standard applied to passenger operations prior to the 1995 amendment. This result gives meaning to both paragraphs (3)(A) and (3)(B). It preserves existing employer and employee expectations in transferred rail service from any pre-existing mass

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7See: P.L. 97-449 § 4(b)(4), 96 Stat. 2413, at 2441; and the note to that legislation prepared by the House Office of Law Revision Counsel, as reprinted in 1982 U.S. Code, Cong., and Ad. News , 97th Cong., 2d Sess. 4220, at 4260.

transit operation under (3)(A), yet provides a "fresh start" analysis for new commuter operations under (3)(B), without regard to the changes made by the 1995 amendment.

Prior determinations by this agency of coverage of commuter rail operators are consistent with this analysis of (c)(3)(A). Government authorities which assumed rail passenger operations formerly conducted by rail carrier employers have been determined to be covered employers. See: Coverage Legal Opinion L-81-160, *Northeast Illinois Regional Commuter Railroad Corporation*,(R. 433-435); Coverage Legal Opinion L-83-45, *Metro-North Commuter Railroad* (R. 436-438); Coverage Legal Opinion L-83-59, *New Jersey Transit Rail Operations*, (R. 439-442).

The remaining question is the standard the Board is to apply under paragraph (c)(3)(B) to determine the status of newly-begun government commuter operations under the RRA and RUIA. An authority which transports passengers across State boundaries prima facie conducts rail carrier service in interstate commerce, and would be covered on that basis. Transportation within one state prior to the effective date of the 1995 ICC Termination Act fell under prior section 10501(b)(1), which stated that:

> (b) The Commission does not have jurisdiction under [the general jurisdiction grant of] subsection (a) of this section over—
> (1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) * * * (former 49 U.S.C. § 10501(b)(1), as codified by P.L. 95-473, (92 Stat. 1337 at 1359).

Cases law decided prior to the ICC Termination Act of 1995 explains that a passenger rail carrier which itself did not cross State boundaries was subject to ICC jurisdiction under 10501(b)(1) if the carrier had sufficient connections with interstate commerce to not operate "entirely within a State".

The Supreme Court addressed the issue of whether intrastate travel becomes part of a trip in interstate commerce in United States v. Yellow Cab Co., 332 U.S. 218 (1947). Insofar as is relevant here, that case concerned the Government's charge that Yellow Cab engaged in restraint of trade under the Sherman Act by obtaining 86 percent of all taxi licenses in Chicago in order to exclude competitors. The Government claimed that because many travelers took cabs to and from the railroad stations at the beginning and end of an interstate journey, the increased fares made possible by Yellow Cab's conspiracy to limit the number of taxis impacted on interstate commerce, even though the taxi ride itself was clearly intra-state in each case. 332 U.S. at 230-231. Justice Murphy wrote that "the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination." (Id. at 232). Noting that the traveler had many alternative means to travel to and from the train station, he concluded that the beginning and ending cab rides were too unrelated to interstate commerce to fall under the Sherman Act.

In 1982 the U.S. Court of Appeals affirmed an unreported decision by the former Interstate Commerce Commission which applied reasoning similar to

Yellow Cab in Magner-O'Hara Scenic Railway v. I.C.C., 692 F. 2d 442, (6th Cir., 1982). Magner proposed a tourist passenger rail operation over 262 miles of track entirely within Michigan. While Magner operated its own equipment with its own employees, the proposed line was owned by three interstate freight rail carriers, only one of which agreed to grant Magner trackage rights. Magner applied for ICC approval to conduct its operation, evidently with the objective of obtaining ICC assistance in gaining trackage rights from the remaining two rail carriers, but the ICC found it lacked jurisdiction over the proposal. The Sixth Circuit affirmed, finding that the fact that the proposed railway lay entirely in one State, and that "no connectors to any other common carrier are planned" constituted substantial evidence supporting the ICC decision. 692 F. 2d at 444-445.

The ICC subsequently cited both Yellow Cab and the Magner-O'Hara decision in Napa Valley Wine Train, Inc. Petition for Declaratory Order, 7 I.C.C. 2d 954 , Finance Docket No. 31156, (July 18, 1991), 1991 ICC LEXIS 195. Wine Train acquired a 21 mile line of rail entirely in California from a freight carrier and intended to conduct a passenger excursion service. A number of individuals and wineries who objected to Wine Train's proposal sought to prevent its operation by alleging that Wine Train failed to meet various California legal requirements. Wine Train in turn sought to avoid State regulation by obtaining an ICC order finding that Wine Train in fact engaged in interstate commerce, and consequently California regulations were pre-empted by Federal law. In support of its petition, Wine Train argued that it engaged in interstate commerce because it would

conclude a "through-ticket" arrangement with Amtrak which would allow Amtrak interstate passengers to ride Wine Train under one fare. However, Wine Train's rail line was physically separated by 30 miles from the Amtrak rail line, and Wine Train acknowledged that even a passenger with a "through ticket" from Amtrak to Wine Train would have to separately purchase a bus ride in order to bridge this gap.

The ICC determined on these facts that Wine Train conducted only intrastate transportation excluded from ICC jurisdiction under section 10501(b). Though noting that a bona fide through ticket may be sufficient to subject intrastate operations to ICC jurisdiction, the ICC found Wine Train's operation lacking in other respects. Wine Train had no physical connection with Amtrak; there was no evidence that a significant number of Wine Train passengers would come from Amtrak and would in fact be moving in interstate commerce; the connecting service required a bus ride; differing schedules made it difficult for Amtrak passengers to connect with Wine Train; and Wine Train marketed itself as a local tourist excursion.

These cases indicate that in using 10501(c)(3)(B) to make a determination of whether a new intrastate passenger rail carrier engages in interstate commerce for purposes of section 1(a)(1) of the RRA and sections 1(a) and 1(b) of the RUIA, the Board is to consider whether the intrastate passenger carrier has a through-ticket arrangement with an interstate rail carrier; whether the rail lines of the inter- and intrastate carriers are physically connected; whether a passenger must purchase an intervening motor carrier ride to make a travel

connection between the inter- and intra-state carrier; whether the schedules of the two rail carriers coincide sufficiently to allow efficient passenger transfer between the two modes of transportation; whether a significant number of passengers would come from the interstate passenger carrier; and whether the intrastate rail carrier markets itself as more than a local passenger service. In determining whether a trip on the intrastate carrier constitutes a portion of interstate travel, the Board may also consider whether the passenger has multiple local alternatives to the using the intrastate rail carrier when initially embarking on or disembarking from the interstate travel.

Prior decisions of this agency reached results consistent with the standards found in ICC case law. Thus, in B.C.D. 94-116 *Southern California Regional Rail Authority*, (R. 414-416), the Board held a commuter authority owning rail line solely in California not to be a covered employer, though employees of the contract operator Amtrak continue to be covered. To the same effect, the Deputy General Counsel determined local commuter operations not to be covered employers in Notice No. 91-66, *Dallas Area Rapid Transit*, (R. 321-322); and Notice No. 89-35, *Tri-County Commuter Rail Organization*, (R. 374-375). In comparison, in B.C.D. 03-23 *Massachusetts Bay Commuter Railroad Company, LLC* (R. 426-427), the Board held an operator of commuter passenger service in the Boston area, which included service across State boundaries between Boston and Providence, Rhode Island was a covered rail carrier employer.

B. Herzog Transit Services Does Not Meet Either Alternative Provision of 49 U.S.C. 10501(c).

It is necessary to restate prior to discussing the evidence that the Board has charged me to consider whether there has been "a change in the operations" of Herzog Transit since the 1994 decision. The record establishes that Herzog Transit has indeed changed by significantly expanding operations to other states since 1994.8 Nevertheless, applying the foregoing standards to the evidence of record, I conclude that the changes since 1994 do not render Herzog Transit a rail carrier employer under the RRA and RUIA, either with respect to the Miami operation for SF RTA since 1994, or with respect to similar operations begun in other cities since 1994.

The first step in analysis is to determine whether any of the commuter rail operations conducted by Herzog Transit must be subject to the RRA and RUIA because the operation was assumed from a rail carrier which previously conducted commuter service pursuant to 49 U.S.C. § 10501(c)(3)(A). Addressing first Herzog Transit's operation of Miami area commuter service for SF RTA, the record shows that commuter service over the South Florida Rail Corridor was first organized by FDoT in 1988, and the first commuter trains were run under SF RTA auspices in January 1989. (R. 375,380). The commuter passenger service was thus initiated by the government authority, rather than assumed from an interstate rail carrier.

Moreover, Herzog Transit is the second contract operator for SF RTA,

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8 The location and date of commencement of each of these new operations is summarized in Chart One of the Appendix attached to this Report.

because it assumed the operation from UTCD Transit Services in 1994 (R. 7) UTCD had never been determined by the former ICC to be subject to its jurisdiction, and both the Railroad Retirement Board and the National Labor Relations Board also determined UTDC not to be a covered rail carrier employer under the RRA, RUIA, and Railway Labor Act. (Ex. 54, R. 385-41). Since UTDC was never determined to be a rail carrier employer, Herzog Transit did itself not assume the Miami area passenger rail service from an interstate rail carrier when SF RTA awarded Herzog Transit the new contract.

Accordingly, Herzog Transit cannot be determined to be a rail carrier employer "subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49" pursuant to paragraph (A) of section 10501(c)(3) because the operation Herzog Transit undertook for SF RTA was not previously a commuter rail operation conducted by a rail carrier employer covered under the RRA and RUIA.

The same result obtains for three of the four passenger rail operations which Herzog Transit has added since the Board's coverage decision in 1994. Trinity Railway Express in Dallas-Fort Worth began passenger service in December 1996. (R.314) The rail line was acquired by Trinity co-operator Dallas Area Rapid Transit (DART) directly or through a subsidiary, from the Southern Pacific Transportation and from the Missouri Pacific Railroad, with the intention of initiating commuter rail service. (R. 333). Herzog Transit was the first passenger operator. Altamont Commuter Express (Ace) began passenger service 1998, (R.349), and now runs between Stockton, about 70 miles west of San Francisco,

and San Jose at the south end of San Francisco Bay. (R.348) The rail line uses track rights acquired from the Union Pacific for the purpose of commuter operations. (R.345) Herzog Transit was the first passenger operator. Rail Runner Express in New Mexico presently uses 50 miles of track of almost 300 total miles acquired from the BNSF by the Mid-Region Transit District in order to initiate commuter rail service and relieve highway congestion. (R. 411 1916-1917). No commuter rail service was conducted prior to July 2006, when Herzog Transit began service as the contract operator. (R.411) In each case, passenger rail service was initiated by a local government entity. Neither the local entity, nor Herzog Transit, assumed a commuter operation previously conducted by covered rail carrier employer. Consequently, the passenger operation conducted by Herzog Transit for each of these three entities does not become a rail carrier employer on the basis of 49 U.S.C. § 10501(c)(3)(A).

The fourth new passenger rail operation conducted by Herzog Transit is also not a covered rail carrier employer, but for a different reason. The Waterfront Red Car, which began in July 2003, is similar to the other three post-1994 operations in that Herzog Transit has again contracted with a government entity to operate passenger service over 1½ miles of track owned by the Port of Los Angeles. (TR.147-149). Unlike the others, however, the Waterfront Red Car uses electric trolleys powered through overhead catenary wires. (TR 147) Freight service over the line is separately provided by the Union Pacific using diesel-electric locomotives.(TR 147) The Waterfront Red Car is thus a purely passenger electric trolley operation traveling a short distance. On these facts, I

find that the Waterfront Red Car falls within the electric railway exception to rail carrier coverage under RRA section 1(a)(2)(ii) and RUIA section 1(a). Compare, Subway Division, Rochester Transit Corp. 255 I.C.C. 508 (1943)(holding electric railway which derived 49% of business from freight operations to be covered employer under the predecessor provision of the Railroad Retirement Act of 1937).

If Herzog Transit is not a covered passenger rail carrier employer under the Acts because none of the passenger commuter service it conducts was assumed from a rail carrier pursuant to section 10501(c)(3)(A), then the next step under paragraph (c)(3)(B) is to determine whether Herzog Transit is a rail carrier employer under the law as in effect prior to 1996. I find that the evidence of record does not support a conclusion that any of Herzog Transit's commuter passenger rail operations in Florida, Texas, New Mexico, or California either individually or collectively render Herzog Transit a rail carrier subject to the jurisdiction of the STB pursuant to paragraph 10501(c)(3)(B).

Beginning again with the Miami operation for SF RTA, both the employees and Herzog Transit have maintained that the SF RTA operation has not changed significantly since inception. In the response dated July 23, 2004, Herzog Transit Vice President Norman Jester stated Herzog Transit's scope of services for SF RTA remained the same. (R. 141) Witness [redacted] testified at the May 2006 hearing that he believed Herzog Transit should be a covered rail carrier employer because the initial decision that UDTC was not a covered employer was incorrect. (TR. 20).

The evidence shows that the SF RTA line is physically connected to the interstate rail system, and indeed the line itself is used as part of the interstate rail system by CSXT and Amtrak. Further, cars and locomotives destined for the Herzog Transit operation have arrived and departed from interstate service over the entire period before and after 1994. The employees' collection of letters in Exhibit 64 includes observations of these activities both before and after 1994. For example, letter from Mr. Santor states that as an locomotive engineer over the period 1994 to 2006, he moved cars and locomotives between the CSXT and SF RTA portions of the Hileah yard on at least 20 occasions. (R. 449). Another engineer, Mr. Healy, stated he retrieved from CSXT Interchange Tracks a rebuilt SF RTA locomotive that had been sent elsewhere for service (R.458). A conductor with 17 years of SF RTA service, Mr. Eugene Mehalik, wrote of similar instances of placing SF RTA equipment for shipment interstate to be repaired. (R. 462-463). However, Herzog Transit witness [redacted] testified that Herzog Transit has no interchange agreement with a freight line (TR. 165), and witness [redacted] acknowledged that had never seen any documentation of freight shipments (TR. 72).

I find the testimony of the witness for Herzog Transit and the two employee witnesses to be credible, as are the personal observations appearing the employees' written statements in Exhibit 64. Finding the employees' testimony and written statements to be credible representations of fact that rail cars and locomotives have physically moved over SF RTA rails does not mean that I must accept as true their testimony that Herzog's SF RTA operation

"interchanges" with freight rail carriers and with Amtrak in the sense that it engages in interstate commerce. I note authority is split as to whether the determination that a particular activity is inter- or intra-state commerce involves a question of law or of fact. 15A Am Jur 2d, Commerce § 8. The RRA and RUIA, though, vest the Board with sole authority to render both findings fact and conclusions of law in any proceeding under the Acts. The question under either standard as to whether Herzog Transit's activity is interstate commerce under the Acts must be resolved by the Board, not by the witnesses' opinions. See RUIA sections 5(c) and 5(g), incorporated by RRA section 8.

Applying the case law to the evidence shows Herzog Transit's operation in Miami to have aspects of both inter- and intra-state commerce. On one hand, the SF RTA line is physically connected to the interstate rail system, and the South Florida Rail Corridor line is actually used not only for interstate freight service by CSXT, but for interstate passenger service by Amtrak. Passengers may make a connection to and from Amtrak and the SF RTA by using five shared train stations. Based on crew observations, a significant number of Amtrak passengers, estimated at 830 to 1,660 passengers per week9, make this connection. These elements point toward a connection to the stream of interstate commerce. Manger-O'Hara, and Wine Train, supra.

Other factors weigh in favor of solely intra-state transportation. Herzog

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9 Witness [redacted] estimated 5 to 10 passengers per train run were coming from or going to Amtrak trains. (TR 50). Trains run 28 times each weekday, and 26 time Saturday and Sunday, for a total of 166 trains per week (28 trains x 5 weekdays +26 trains on weekends). If 5 Amtrak passengers were transferring on each, the weekly total would be 830; if 10 Amtrak passengers, the weekly total would be 1,660.

Transit and Amtrak have no joint "through ticket" arrangement allowing passengers to begin on a SF RTA train, then move to an Amtrak train, without an additional fare. SF RTA is constituted by Florida statute as a local commuter authority, not an interstate transportation business, and Herzog Transit may only contract to operate a business which SF RTA is authorized to conduct. Wine Train, supra. Moreover, the intra-state rail line sought by Manger-O'Hara was not only used, but owned by interstate freight carriers, yet the ICC focused exclusively on Manger-O'Hara's proposed intra-state passenger use of the line in concluding it was not subject to ICC jurisdiction. Manger-O'Hara, supra. SF RTA's operation is local in the same sense as Manger-O'Hara. Finally, when a passenger disembarks from Amtrak at one of the five joint stations, he may choose to continue his journey by taxi or private auto as well as by SF RTA train, just as the cab passengers in Yellow Cab. 332 U.S. at 232. I conclude that the evidence as a whole establishes that passengers are not embarking from or continuing into interstate commerce when they are on a SF RTA train.10

I reach this conclusion despite the acknowledged fact that all traffic over the South Florida Rail Corridor, including the CSXT freight service and the passenger service by Herzog Transit and Amtrak, is subject to the same rules governing train operation and safety. At the May 2006 hearing, the employees

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10 . Herzog Transit has provided the brief by UTU to the NLRB, in which UTU conceded that the employees of UTDC were not covered employees under the Railway Labor Act. (R. 1201-1202). UTU is not estopped from contesting the issue before the Railroad Retirement Board because the Herzog Transit and the Board were not parties, and because the definitions of covered employer under the RRA, RUIA, and Railway Labor Act are not precisely coincident. Nevertheless, it is noteworthy that at least in one context, UTU reached the same conclusion as I recommend.

and UTU submitted a copy of the CSX Operating Rules, the CSX Safety Rules, the CSX Equipment Handling Rules, the CSX Signal Rules, and the CSX Hazardous Materials Handling Rules (TR. 31, 32, Exhibits 66 through 71, R. 568-886). The employees and UTU argue that if CSXT is a rail carrier, and if CSXT is subject to these various rules, then if Herzog Transit is subject to these rules, it must be a rail carrier as well. The unstated premise to this argument, though, is that all rail operators subject to these rules are rail carriers also subject to STB jurisdiction. Because this unstated premise is false, the evidence that Herzog Transit operates under these rules does not prove the asserted conclusion.

The definition of rail carrier employer under the RRA and RUIA, as noted above, derives from the jurisdictional statute of the STB under the Interstate Commerce Act. CSXT is required to promulgate the various rules submitted in evidence not by the STB, but by the Federal Railroad Administration of the Federal Department of Transportation (the FRA). See, 49 CFR Part 218 Railroad Operating Practices; 49 CFR Part 229 Railroad Locomotive Safety Standards; and 49 CFR Part 240 Qualification and Certification of Locomotive Engineers. The FRA is authorized by 49 U.S.C. §20103 to promulgate safety regulations pertaining to "railroads", which are defined by 49 U.S.C. § 20102(1) in pertinent part as:

> (A) * * * any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including—
>
> (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979 * * *

Unlike STB jurisdiction in 49 U.S.C. §10503(c)(3)(B), the FRA is specifically granted authority to regulate the safety of all intra-state commuter passenger railroads, whether operated by Conrail or otherwise. Because FRA authority extends beyond that of the STB, the fact that Herzog Transit is subject to FRA regulation does not establish that it is a rail carrier for purposes of STB jurisdiction, or for benefit entitlement purposes under the RRA and RUIA.

I also find that the evidence regarding Herzog Transit's new operations in other States does not support the conclusion that Herzog Transit is a rail carrier employer under the Acts with respect to any of those operations. The facts in each case are essentially the same as those pertaining to SF RTA. Trinity Railway Express in Dallas/Fort Worth, ACE in San Joaquin, and Rail Runner Express in Albuquerque each operate entirely in one State over track owned or leased by a local authority established to conduct commuter train service. Substantially all of the track in each case is also used by an interstate freight carrier, which provides all freight carriage. Though each shares at least one station with Amtrak, there is no evidence that any of the three have a through-ticket arrangement with Amtrak. Moreover, there is no evidence regarding the

number of Amtrak passengers using the commuter service. Under Wine Train, Manger-O'Hara, and Yellow Cab, these operations do not have sufficient connection with interstate commerce to fall under jurisdiction of the STB.

Finally, I note that Herzog Transit's headquarters is located in St. Joseph, Missouri (TR. 173). Herzog Transit conducts passenger rail operations in four other States: Florida, Texas, California, and New Mexico. By marketing its services to purchasers in these States from the Missouri headquarters, Herzog Transit itself clearly engages in interstate commerce. Yellow Cab, 332 U.S. at 225, (sale of auto manufactured in Michigan to cab company in Illinois is interstate trade). I also note that the Board has found that a covered rail carrier operating a freight line entirely within one State is a covered employer with respect to other operations in another State as well, even if those operations would not themselves be rail carrier operations. See B.C.D. 03-10, *Transit America LLC*. However, I am aware of no authority, and UTU cites none, which would convert four unconnected intra-state rail operations into one interstate rail carrier for purposes of STB jurisdiction. I therefore find that Herzog Transit's operation of four commuter rail passenger services in different States, none of which are individually rail carrier employers, does not render Herzog Transit a rail carrier itself.

II. HERZOG TRANSIT SERVICES IS NOT A COVERED EMPLOYER UNDER THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE ACTS BY REASON OF PERFORMING SERVICES IN CONNECTION WITH RAILROAD TRANSPORTATION.

A. A Non-Rail Carrier Affiliate Employer Must Perform More Than Minimal Services for the Affiliated Rail Carrier Employer.

If new operations conducted by Herzog Transit Services since 1994 do not render it a rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts, it remains to consider whether the new operations render Herzog Transit a covered employer under any other provision of the Acts. Though both Acts provide that receivers, railroad associations and labor organizations may be covered employers, the only provision relevant to Herzog Transit is section 1(a)(1)(ii) of RRA, stating that a non-carrier affiliate of a rail carrier employer is also a covered employer under the Act if it meets two conditions:

> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §351(a) and (b) contain a substantially similar definition.

The Board has promulgated regulations which define both "common control" and "service". With respect to common control, section 202.4 of the Board's regulations provides that:

> A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person. (20 CFR 202.4)

Section 202.7 of the Board's regulations defines "service in connection with transportation of passengers or property by railroad" as follows:

> * * * service rendered or the operation of equipment or facilities * * * is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (20 CFR 202.7).

In Coverage Legal Opinion L-71-177, *Staten Island Rapid Transit Operating Authority* (R. 1244-1246), the Board's General Counsel specifically considered whether a public authority which provided commuter rail service performed a service in connection with rail transportation under these regulations, the RUIA, and the analogous provision of the Railroad Retirement Act of 1937, predecessor to the current RRA of 1974. The City of New York had purchased a 14.5 mile line of track from a private company, the Staten Island Rapid Transit Railway Company (Staten Island Rwy). The City granted Staten Island Rwy trackage rights to continue freight service over the line, and the City further agreed to maintain the rail line. The Metropolitan Transportation Authority (MTA), a public transit instrumentality of New York State separate from the City, then formed Staten Island Rapid Transit Operating Authority (SIRTOA). SIRTOA

then obtained a lease of the City's line for passenger service. SIRTOA also agreed to maintain the right of way and signals for the City; and to dispatch trains over the line.

The General Counsel found that as the MTA also owned the Long Island Railroad, a carrier by rail subject to the jurisdiction of the Interstate Commerce Commission, SIRTOA was consequently under common control with the Long Island. The General Counsel then concluded that the maintenance of track and signals, and the dispatching of trains, constituted "substantial services in connection with, and supportive of, railroad transportation." Consequently, L-71-177 determined SIRTOA to be covered under the RRA of 1937 and RUIA as a non-carrier affiliate employer. When eighteen years later, SIRTOA advised the Board that all freight service had been abandoned over the entire line, and that the ICC had ruled it no longer had jurisdiction over the line, the Deputy General Counsel determined SIRTOA ceased to be a covered employer under the Acts because it no longer performed services in connection with railroad transportation. Coverage Legal Opinion L-89-63, *Staten Island Rapid Transit Operating Authority.* (R. 1247-1254).

The two *Staten Island* decisions, standing alone, support the proposition that a public authority operator of intrastate commuter passenger service over a publicly-owned rail line, if performing maintenance of and dispatching over the rail line, is covered as a non-carrier rail affiliate employer under the RRA and RUIA. This conclusion, however, must be viewed in light of subsequent interpretations of the Acts by the Courts and the Board.

The initial SIRTOA decision in 1971 cited as support the Court of Appeals decision in Southern Development Company v. Railroad Retirement Board, 243 F. 2d 351 (8th Cir., 1957). Southern Development Company owned an office building, 64 percent of which was occupied by offices of the related rail carrier. 243 F. 2d at 352. The Eighth Circuit held that by maintaining the property used by the rail carrier in its operations, Southern Development performed a service in connection with rail transportation. Id. at 355. However, in 1987, the Court of Appeals considered a case under the Railroad Retirement Tax Act (RRTA) which was identical to Southern Development, except that only about half of the property was occupied by the affiliated rail carrier. Standard Office Building v. United States, 819 F. 2d 1371, (7th Cir., 1987), at 1379. After analyzing previous cases under both the RRA and RRTA, the 7th Circuit concluded Standard Office did not perform a service in connection with rail transportation. The Court considered both the proportion of occupancy by the railroad affiliate, and the expectations of Standard Office custodial employees in reaching its decision. 819 F. 2d at 1379-80.

Later, the Seventh Circuit held the non-carrier affiliate covered where it performed less than half of its services for the affiliated rail carrier but over half for the railroad industry in general. Livingston Rebuild Center v. Railroad Retirement Board, 970 F.2d 295, 296 (1992)(car repair 25% for affiliate, 95% for industry). These cases raised a question as to whether, and to what degree, the non-carrier affiliate must perform service for the affiliated rail carrier under section 1(a)(1)(ii).

The Board answered this question in B.C.D. 93-79 *VMV Enterprises*. (R. 1255-1260). VMV Enterprises earned about 58 percent of its revenue from rail car repair work for the industry, but only 2.5 percent was earned from repairs for its rail carrier affiliate. The Board determined that to fall within the non-carrier affiliate provision of the RRA and RUIA, the non-carrier affiliate must provide "more than minimal service to its rail carrier affiliate". (R. 1258). The Board later applied this standard to find the non-carrier affiliate covered in B.C.D. 95-26 *Interstate Reloads*. (R. 1261 – 1269). The non-carrier company performed over 30% of its freight loading and unloading service for its affiliated rail carrier, and between 60% and 80% for railroad industry in general. (R. 1262). The Board's decision was affirmed by the District of Columbia Circuit in Interstate Quality Services v. Railroad Retirement Board, 83 F. 3d 1463, (D.C. Cir., 1996).

If repair of the engines which provide locomotive power in Livingston Rebuild Center may be a service in connection with railroad transportation under the Acts, there is no reason to question the General Counsel's unstated conclusion in L-71-177 that maintenance of signals and track, and train dispatching performed by SIRTOA are also "reasonably directly related, functionally or economically, to the performance of obligations which a company or companies * * * have undertaken as a common carrier by railroad" as defined by section 202.7 of the regulations. See also, Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir., 1983)(manufacture and provision of concrete railroad ties to affiliated rail carrier for maintenance of way). Nevertheless, in view of *VMV Enterprises*, I find that a intrastate passenger

commuter operation which performs the services listed in *SIRTOA* must perform more than a minimal proportion of these services for a rail carrier affiliate.

B. <u>Herzog Transit Services Does Not Perform Services for an Affiliated Rail Carrier Employer</u>.

Once again, I note that Herzog Transit operations have expanded considerably since the Board rendered B.C.D. 94-109. Considering the evidence of record with respect to these new operations in light of the foregoing principles, I conclude that Herzog Transit is not covered under the RRA and RUIA as a non-carrier affiliate company of a rail carrier employer by reason of any operations which begun after 1994.

Initially, the record shows that Herzog Transit is under common control with a rail carrier. Herzog Transit is parent to Transit America, which owns the Buchanan County rail line in Missouri. Through ownership of Transit America, Herzog Transit is also parent to TA Services Inc., which operates the Buchanan County rail line, and the "Coaster" passenger service for the North San Diego County Transit Development Board. Both Transit America and TA Services, Inc., have been determined to be rail carrier employers under the RRA and RUIA. Further, Herzog Transit is itself the wholly-owned subsidiary of Herzog Contracting. Herzog Transit conceded at the May 2006 hearing that because Herzog Contracting owns Herzog Transit and indirectly the two rail carrier subsidiaries, Herzog Transit is under common control with a rail carrier employer for purposes of section 1(a)(1)(ii) of the RRA, section 1(a) of the RUIA, and

section 202.4 of the Board's regulations. (TR. 134).11

Herzog Transit does not perform maintenance of right of way on the South Florida Rail Corridor under the agreement with SF RTA, and the trains over the line are dispatched by CSXT employees. (R. 229, TR. 156). Herzog Transit does maintain the right of way and dispatches all train traffic as operator of Trinity Railway Express in Dallas-Fort Worth (TR. 169,151). Herzog Transit maintains the rail line in San Pedro, California for the Waterfront Red Car Line (R. 1232-33), and for the Rail Runner Express in New Mexico (R. 1213-14). In each case, the rail line maintained is also used by freight rail carriers subject to the Acts, as was the rail line maintained by SIRTOA.12 In none of these cases is the rail line used by any rail carrier affiliated with Herzog Transit: The portion of service to the affiliated carrier is zero. Lacking the minimal proportion of service to an affiliate necessary under the *VMV Enterprises* decision, none of the services in addition to passenger commuter operations which Herzog Transit performs in Texas, California or New Mexico constitute services in connection with railroad transportation under the RRA and RUIA.

Herzog Transit also performs car repair in two "stand alone" operations for governmental passenger operators, New Jersey Transit Rail Operations, and North Carolina Department of Transportation "Piedmont" train. Neither of these two authorities contract with Herzog to operate the trains. In each case the services are performed for entities totally unrelated to Herzog Transit.

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11 The ownership of these companies is illustrated in Chart Two of the Appendix attached to this Report.

12 The maintenance and dispatching services for each commuter rail operation is summarized in Chart One of the Appendix attached to this Report.

Accordingly, under *VMV Enterprises*, these car repair and maintenance operations are not services in connection with railroad transportation under the RRA and RUIA.

As noted earlier, Herzog Transit is parent to Transit America, which owns the Buchanan County rail line in Missouri. Through ownership of Transit America, Herzog Transit is also parent to TA Services Inc., which operates the Buchanan County rail line, and the "Coaster" passenger service for the North San Diego County Transit Development Board. [redacted], who testified at the May 2006 hearing as witness for Herzog Transit and handles Herzog Transit labor relations, is himself an employee of Transit America. (TR. 175, 177). Subsidiary rail carrier Transit America therefore performs at least some administrative services for its non-rail carrier parent, Herzog Transit. However, there is no evidence of record that the reverse is true: i.e., no evidence shows Herzog Transit, the non-carrier affiliate, performs administrative services for Transit America, the rail carrier. Again, under the *VMV Enterprises* test, the "service" in question must flow from the non-carrier to the affiliated railroad.

The evidence does not show that Herzog Transit performs any services in connection with the transportation of passengers or property by rail either with respect to the commuter rail operations it conducts, or with respect to the rail carrier operations conducted by its affiliated rail carrier employers. I therefore conclude that Herzog Transit is not an employer covered by section 1(a)(1)(ii) of RRA or section 1(a) of the RUIA.

III. THE HERZOG TRANSIT TRAIN DISPATCHERS UNDER THE TRINITY RAILWAY EXPRESS CONTRACT PERFORM RAIL CARRIER EMPLOYEE SERVICE UNDER THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT INSURANCE ACTS.

A. A Rail Line Which Dispatches Interstate Trains Over its Rail Line is a Rail Carrier Employer under the RRA and RUIA.

The previous portions of this Report have considered whether Herzog Transit, by reason of the new operations it has begun since the Board's decision in 1994, changed its status as a covered employer. Because the train dispatching conducted beginning in year 2000 by Herzog Transit under its agreement with Trinity Railway Express in Texas is a special case, this section of the Report considers that activity separately from all other operations.

Where a line of railroad is owned by one entity but operated as a rail carrier by a second, unrelated entity, the RRA, the RUIA and the agency's regulations do not directly address the status under the Acts of the owner of the rail line as a rail carrier employer. Consequently, a line of Board decisions have defined the circumstances under which the owner of a rail line leased or contracted to another would be a rail carrier employer under the Acts.

Initially, the Board established in 1941 a universal rule that where a rail line was owned by one company but operated by another, both the lessor and lessee companies were rail carrier employers under the RRA and RUIA. See Board Order 41-10 *Central Vermont Transportation Company*. Forty-eight years later, the Board reconsidered the status of a "lessor" employer in Board Order 89-74, *Board of Trustees of Galveston Wharves*. (R. 323-329). *Galveston Wharves* ruled that if a lessor retained merely a reversionary interest in the right

of way as real estate, but had no equipment with which to conduct rail carrier business if the lessee ceased operations, then the lessor company was not a rail carrier employer under the Acts.

The Board revisited the issue again in the year 2000, and struck a posture between *Central Vermont*'s holding that all lessor companies were rail carrier employers regardless of the ability to actually conduct rail service, and *Galveston Wharves'* holding that a lessor without equipment was not a rail carrier employer. See B.C.D. 00-47, *Railroad Ventures, Inc.*, (reconsideration decision)(R. 420-425). As recently restated by B.C.D. 07-04, *Blue Rapids Railway Company,* under the Board's decision in *Railroad Ventures* the owner of a rail line operated in interstate commerce by another entity will be determined to be a rail carrier employer under the RRA and RUIA unless three conditions are met:

> (1) the owner/lessor does not have as a primary purpose to profit from railroad activities;
>
> (2) the owner/lessor does not operate or retain the capacity to operate the rail line; and
>
> (3) the operator/lessee of the rail line is already a covered employer under the RRA and RUIA.

As mentioned earlier, the Board in B.C.D 94-116 *Southern California Regional Rail Authority,* initially determined that So. Cal Regional Rail was not a rail carrier employer because it merely owned the line of rail operated in interstate commerce by a trunk line rail carrier covered by the RRA and RUIA, and by Amtrak. (R. 414-416). When the Board was informed that So. Cal. Regional Rail had formed a division to dispatch trains over its rail line, though,

the Board held that the dispatching division of the government authority engages in carrier business and consequently is a covered rail carrier employer under the RRA and RUIA. See: B.C.D. 02-12 *Southern California Regional Rail Authority, Segregation of Dispatching Department*, (R. 417-419). While it did not directly address the *Railroad Ventures* factors, I infer that the Board found that So. Cal. Regional Rail no longer merely passively owned real estate when its employees began to actively determine the order in which trains run over its rail line because this is clearly a part of rail carrier service. The *Dispatching Department* decision therefore clarifies that to satisfy the second and third elements of *Railroad Ventures*, the covered employer "operation" of the lessor's rail line must include dispatching train service over the line. Where the rail line owner, rather than the rail service operator, dispatches the train service, then the lessor rail line owner operates the line to that extent in interstate commerce as a covered rail carrier employer under the RRA and RUIA. This "carrier business" portion of the lessor may be segregated from "non-carrier business" of the lessor under section 202.3 of the Board's regulations (20 CFR 202.3) if appropriate.

B. <u>The Train Dispatchers for the Trinity Railway Express Rail Line are Rail Carrier Employees under the RRA and RUIA</u>.

The individuals who dispatch interstate freight trains, Amtrak interstate passenger trains, and Herzog Transit intrastate commuter passenger trains for Trinity Railway Express are in the identical position to the dispatchers of interstate freight trains, Amtrak interstate passenger trains, and intrastate commuter passenger trains over the line owned by So. Cal. Regional Rail. If the

owner of the rail line, Dallas Area Rapid Transit (DART) conducted the dispatching itself, under the *Dispatching Department* decision DART would be an active rail carrier employer with respect to that business, and the dispatchers would be covered DART employees.

In this case, however, DART has contracted this portion of its rail carrier responsibilities not to one of the freight lines (UP RR or BNSF), but to Herzog Transit. With respect to train dispatching, then, DART, Trinity and Herzog Transit fail the third element of the *Railroad Ventures* test because it is not conducted by a covered rail carrier. This must mean that either (1) the dispatching activity is attributed back to DART as "Lessor" rail line owner, or (2) Herzog Transit is acting as a "Lessee" rail carrier employer under contract with DART, with respect to this activity only. In either case, the dispatchers are employees of a rail carrier employer under the RRA and RUIA.

Trinity Railway Express and DART have not been notified of, or participated in any capacity in, the proceedings connected with this Report. Moreover, because the focus of the inquiry pursuant to the Board's Order has been Herzog Transit's activity as operator for SF RTA in Florida, only minimal information has been obtained regarding the Trinity operation. For these reasons, I believe it is inappropriate to make any recommended decision to the Board in this Report regarding the status of the train dispatchers over the Trinty/DART rail line beyond my finding that under the *Dispatching Department* decision, this must be covered rail carrier service. Rather, I recommend the matter be referred to the General Counsel and to the Division of Audit and

Compliance, Bureau of Fiscal Operations for preparation of an initial decision.

CONCLUSION

The Board directed that I prepare this Report in response to the requests made by individual Herzog Transit employees for a determination that the service performed in the Miami commuter operation was service to a covered employer under the RRA and RUIA. The employees' fundamental belief, that their operation of heavy rail equipment over a rail line used by other covered employers (CSXT and Amtrak) should render them covered employees for benefit entitlement purposes under the Acts, has visceral appeal. This is especially true when it is conceded that other visually indistinguishable heavy rail commuter operations elsewhere in the country, including one conducted by an affiliated Herzog company (TA Services Inc.), are covered as RRA and RUIA employers. The Herzog Transit employees believe it inequitable that the employees running these similar commuter operations are covered for benefit purposes, but the Herzog Transit employees are not.

The hard truth is that a decision regarding a company's status as a covered employer under the Acts must be made on the law, not on the equities. The train dispatching in Texas aside, Herzog Transit's commuter operations in each case do not meet the requirement for rail carrier employer coverage. In no case does Herzog Transit conduct commuter operations of behalf of a government authority which assumed passenger service from a prior covered interstate rail carrier employer. Neither does Herzog Transit conduct in any location commuter operations which would have been subject to jurisdiction of

the former Interstate Commerce Commission prior to 1995. In addition, Herzog Transit's maintenance of way and equipment services in these operations do not render it a covered affiliate employer because Herzog Transit performs none of these services for an affiliated rail carrier employer, as required by relevant Board precedent.

Because Herzog Transit fails either test, the Report must recommend that the Board determine the changes in the business of Herzog Transit Services since B.C.D. 94-109 do not render it a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Respectfully submitted,

Karl T. Blank
Hearing Examiner

April 30, 2007

TABLE OF AUTHORITIES

Cases

Federal Statutes

Regulations

Railroad Retirement Board Coverage Determinations

Miscellaneous

APPENDIX

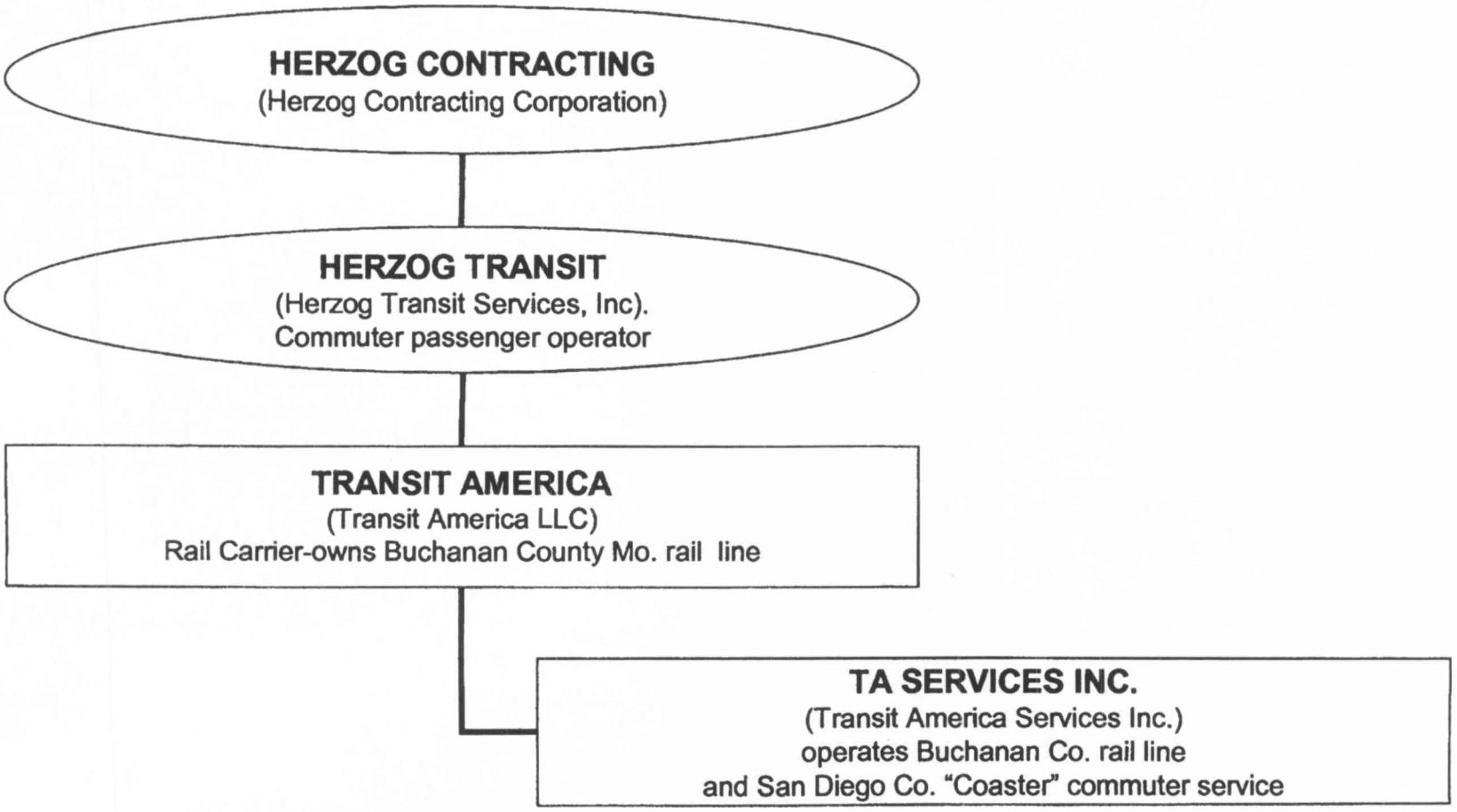
Chart One: Herzog Transit Rail Passenger Operations

Chart Two: Common Control

CHART ONE
HERZOG TRANSIT RAIL PASSENGER OPERATIONS

Name	Location	Service Began	Freight Service	Amtrak Service	Maintenance of Way	Train Dispatcher
SF RTA	Miami Florida	1994	CSXT	Yes	CSXT	CSXT
Trinity Rwy Express	Dallas and Ft. Worth Texas	1996	BNSF UPRR	Yes	Herzog Transit	Herzog Transit
Altamont Commuter Express (ACE)	San Joaquin California	1998	UPRR	Yes	UPRR	UPRR Amtrak
Waterfront Red Car	San Pedro California	2002	UPRR	No	Herzog Transit	(unknown)
Rail Runner Express	Albuquerque New Mexico	2006	BNSF	Yes	Herzog Transit	BNSF

CHART TWO
COMMON CONTROL



OVAL=non-rail carrier company
RECTANGLE=covered rail carrier company